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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DELTA AIR LINES, INC.,
Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellees.

On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

A special session of the Florida Legislature was convened in March, 1983 to raise revenue to meet the financial crisis facing Florida's highway system. A new road tax scheme was passed which was designed to raise $176 million of additional revenue annually. Of this, over $53.4 million was to be paid by interstate air common carriers. This action seeks to establish that the new road tax, as it is arbitrarily applied to the purchase of jet fuel, violates the commerce and equal protection clauses of the United States Constitution. In particular, the following questions are presented:

1. Whether the court below erred in relying upon repudiated commerce clause cases of a past era and in misapplying the proper test under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), by holding that Florida's road tax scheme is a general revenue tax that does not violate the commerce clause and is not a "user tax" which is manifestly disproportionate to the services rendered.

2. Whether the court below erred in holding that the road tax, measured by the predetermined price of gasoline, does not discriminate against interstate air common carriers who use jet fuel which is priced much lower than gasoline.

3. Whether the court below erred in holding that there is some rational basis for Florida to discriminate against interstate air common carriers by taxing them as road users under Florida's new road tax when railroads and vessels are taxed as non-road users paying a prorated tax for fuel used in-state into the General Revenue Fund.

PARTIES TO THE PROCEEDINGS BELOW

The parties appearing in the Supreme Court of Florida in this case were Delta Air Lines, Inc. ("Delta"), Appellant *, and the State of Florida, Department of Revenue ("DOR"), Appellee.**

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* Delta Air Lines, Inc. is not a subsidiary of any other corporation. Delta has no subsidiaries (other than wholly-owned subsidiaries) and no affiliates.

** The following appeared as plaintiff/intervenors in the circuit court proceedings: Capitol Air, Inc., Northwest Airlines, Inc., Ozark Airlines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines, and USAir, Inc. The plaintiff/intervenors did not participate in the appeal to the Florida Supreme Court. Pan American World Airways, Inc. filed a separate action which was consolidated with that of Delta's by the circuit court. Pan American World Airways, Inc. has notified the Court that it is an interested party in this appeal and intends to participate as a party. Likewise Eastern Air Lines, Inc. which brought a separate action in the circuit court is appealing separately.

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JURISDICTIONAL STATEMENT

DECISION OF THE COURT BELOW

The decision of the Supreme Court of the State of Florida is reported at 455 So. 2d 317 (Fla. 1984); it is reprinted in the Appendix at pages 1a-12a. Because many of the issues raised by Delta were addressed by the Florida Supreme Court only in the decision in *Eastern Air Lines, Inc. v. Department of Revenue*, reported at 455 So. 2d 311 (Fla. 1984), it is reprinted in the Appendix at pages 13a-23a.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final decision of the Supreme Court of the State of Florida holding that certain state

tax statutes are valid in part and invalid in part. In the pleadings and throughout the proceedings in the state courts, Delta drew into question the validity of these statutes on the ground of their repugnance to the constitution and the laws of the United States. The decision which is here appealed was issued on June 14, 1984 by the Florida Supreme Court, and Delta's Motion for Rehearing was denied on September 12, 1984. Delta filed its Notice of Appeal with the clerk of that court on October 30, 1984. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises questions concerning the validity of the 1983 Fla. Laws 83-3 (hereinafter "Chapter 83-3"), under the commerce and equal protection clauses of the United States Constitution, art. I, § 8, cl. 3 and amend. XIV, § 1 respectively. The text of Chapter 83-3, to the extent pertinent, is set out in the Appendix on pages 39a-48a. The text of the relevant constitutional provision is as follows:

> The Congress shall have Power . . . .
>
> > To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

U.S. Const., art. I, § 8, cl. 3.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

For years airlines along with railroads and vessels have paid a prorated sales tax on fuel purchases in Florida. Revenues from this tax were assigned to the General Revenue Fund of the state. Road users, such as motorists, motor carriers and buslines, paid a "cents per gallon" excise tax on their fuel purchases. The proceeds of that tax were assigned to the State Transportation Trust Fund ("Transportation Fund"), a designated fund for road construction and maintenance.

Early in 1983, Governor Graham called a special session of the Florida Legislature for the primary purpose of enacting new tax legislation to rebuild and improve Florida's road system. In accordance with the Governor's call, the Legislature enacted Chapter 83-3 which was anticipated to yield approximately $176 million in additional revenues annually. Much of the additional revenue was raised by eliminating one half of the original gasoline excise tax (4 cents per gallon) paid by road users and replacing it with a new tax of 5.7 cents which was denominated a "sales tax" but nevertheless continued to be earmarked to the Transportation Fund. This tax is imposed at the 5 percent sales tax rate, but is based upon an established average price for gasoline of $1.148, so that all taxpayers pay the same amount per gallon regardless of the actual price of fuel, just like the old excise tax. Even though the tax on fuel increased 1.7 cents per gallon, this was deemed to be politically acceptable since the impact on individual motorists was minimal.

Chapter 83-3 also includes a new license tax on motor vehicles. The combination of these tax increases on road users was insufficient to meet the road needs, however, and the Legislature added $53 million of projected revenues by imposing on the airlines the same tax as that imposed on road users. Airlines became the only non-

road users paying the tax since all other non highway users—railroads, vessels, home heating, agricultural, commercial, and fishermen—were left in the same position as they were prior to the enactment of Chapter 83-3. The Legislature also provided an income tax credit for Florida-based air carriers of half the tax liability for the fuel tax.

All but a very small portion of the revenues raised by Chapter 83-3 is to be used for road and highway purposes. The Florida Legislature tailored this fuel tax to add airlines to the road-user taxpayers because the tax on airlines, as large fuel users, would yield over $50 million of desired revenue. The effect of this legislation is that a single airline taxpayer such as Delta could pay $10 million or more of the $176 million additional tax raised for road building and maintenance, yet derive no direct benefits from the use of the roads.

Florida's legislature and its courts have taken the position that the United States Constitution imposes no limits on the power of the states to impose such a tax. To require passengers traveling in interstate commerce to pay for Florida's highways is an unreasonable burden on interstate commerce. Florida compounds the problem by imposing the tax on only one segment of interstate commerce.

This case presents fundamental questions of the scope of states' powers to impose specially tailored user taxes which beg for an answer by this Court. The constitutional questions raised in this case ask the Court to extend its analysis of the commerce clause made in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) and to consider the additional impact of the equal protection problems present in Chapter 83-3.

STATEMENT OF FACTS

The Florida Legislature in Special Session passed Senate Bill 8-A, Fla. S.B. 8-A, 1983 Fla. Spec. Sess., on March 4, 1983, which was signed into law by Governor Graham on March 8, 1983, as 1983 Fla. Laws 83-3. (A. 38a-47a).[1] The law as designed is expected to raise approximately $176 million in new taxes annually for the primary purpose of road construction. Chapter 83-3 substantially revises the taxation of fuel in Fla. Stat. chs. 206 (Excise Tax on Fuel), and 212 (Sales Tax), and also modifies Fla. Stat. ch. 220 (Income Tax).

Historically, motor fuel (gasoline) was taxed under Fla. Stat. ch. 206, at the rate of eight cents per gallon; the first four cents called the "First Gas Tax" earmarked for road construction and maintenance (Fla. Stat. § 206.41(4)(a) (1971)); the "Second Gas Tax" of two cents per gallon earmarked for county bond obligations (Fla. Stat. § 206.47 (1971)); the "Seventh Cent Tax" earmarked for county public transportation (Fla. Stat. § 206.60 (1977); and the "Eighth Cent Tax" earmarked for municipal transportation (Fla. Stat. § 206.605 (1977)). Special fuel (diesel) taxes, at the rate of eight cents per gallon were similarly committed (Fla. Stat. §§ 206.87 and 206.875 (1981)).

The proceeds of the First Gas Tax (four cents) and four cents per gallon of the special fuel tax were required to be deposited in the State Transportation Trust Fund (Fla. Stat. § 206.46 (1973) and § 206.875 (1981)). The uses of the moneys in the State Transportation Trust Fund were restricted solely to road construction and maintenance expenses plus administrative expenses pertaining thereto (Fla. Stat. § 339.08 (1982)). Purchases of motor fuel or special fuel for non-road users, *i.e.*, home heating, commercial operations, fishing, farming

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[1] Cites to the record below are referenced herein as "R", and cites to the Appendix are referenced as "A".

and other off-the-road operations, were either specifically exempted from taxation or subject to a tax refund. (Fla. Stat. §§ 206.42, 206.62 and 206.64 (1981)).

While prior to enactment of Chapter 83-3, fuel purchases by motorists and motor carriers[2] were taxed under Fla. Stat. ch. 206; non-road-user carriers—airlines, railroads and vessels—were exempt from the road taxes imposed under Fla. Stat. ch. 206, paying instead a prorated sales tax on fuel under Fla. Stat. ch. 212 deposited into the General Revenue Fund for general revenue purposes.

The new law eliminated the First Gas Tax (4 cents) under Fla. Stat. ch. 206 and reduced the corresponding special fuels tax by 4 cents, substituting a tax in the sales tax chapter, Fla. Stat. ch. 212, (Chapter 83-3, §§ 5 and 6). Although the new tax is imposed at the same rate (5 percent) as the sales tax on other items, the tax on fuel purchases is based upon a predetermined price of gasoline, initially set at $1.148 per gallon, the price subject to adjustment periodically based on the change in the Consumer Price Index for gasoline. The tax is therefore imposed at a flat rate per gallon (5.7 cents) just like the old road tax on fuel. Also just like the old road tax under Fla. Stat. ch. 206, the moneys from the sales tax on fuel go into the State Transportation Trust Fund which continues to be dedicated and restricted primarily for road construction and maintenance expenses. (Fla. Stat. § 212.69 (1983)).[3]

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[2] Motor carriers also paid and continue to pay a "use" tax (an excise tax) under Fla. Stat. ch. 207 on fuel purchased outside of Florida but used on Florida's highways which goes into the Transportation Fund.

[3] While Fla. Stat. § 206.46 (1973), was amended so that the State Transportation Trust Fund might be used for "transportation purposes" rather than only construction and maintenance of state roads, the Department of Transportation's use of the moneys continues to be controlled by Fla. Stat. § 339.08, (1983), which re-

Non-road users such as commercial, agricultural and home heating interests, fishermen, farmers and off-the-road operators, continue to be exempted from taxation or entitled to a refund for fuel purchases under Chapter 83-3. Railroads and vessels continue to be taxed on their transportation fuel on a prorated basis based upon the actual price of the fuel; and their fuel tax proceeds continue to be deposited in the General Revenue Fund. But Chapter 83-3 extends the road fuel tax at the rate of five percent of the predetermined price of $1.148 per gallon to jet fuel purchased by interstate airlines. There is no proration for purposes of taxing only intrastate mileage similar to railroads and vessels. Furthermore, the tax funds are deposited in the State Transportation Trust Fund along with fuel taxes paid by road users primarily for road construction and maintenance use by the Florida Department of Transportation.

Delta purchased 39,485,275 gallons of fuel in Florida during the first quarter of 1983 which, if taxed under the formula in Chapter 83-3, would yield $2,266,452 in fuel taxes. (R. 864). Based upon the price of jet fuel for the first quarter of 1983, Delta's effective tax rate under the formula in Chapter 83-3 is 6.3 percent.[4]

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stricts use of these revenues primarily to road construction and maintenance. Although there are some non-highway uses of the funds in the State Transportation Trust Fund, these also do not benefit airlines. There is an allocation of $2.8 million to the Department of Revenue for aquatic weed control and not less than 10% of the fuel tax revenues can be used for public transit and rail projects.

[4] Since airlines were paying approximately 91 cents a gallon in the quarter ending March 31, 1983, the 5.7 cents tax represented an effective tax rate of 6.3 percent. (R. 641). For the most recent quarter ending September 30, 1984, airline fuel averaged 83 cents a gallon making the effective tax rate on airlines 6.9 percent. The $1.148 established price approximated the average gasoline price, therefore, the 5.7 cents tax on gasoline imposed an effective tax rate of 5 percent.

Chapter 83-3 also amended the Florida Income Tax Code, Fla. Stat. ch. 220, extending an income tax credit of one-half the annual liability for the new sales tax on fuel (limited to $5 million annually) to Florida-based carriers which maintain their home or business offices in Florida and employ more than 1200 in the state. This tax credit was declared violative of the commerce clause of the United States Constitution by the Florida Supreme Court; however, the court held that this provision could be separated from the remaining provisions of Chapter 83-3 ". . . without hampering the legislature's intent to provide a transportation fund for the state." (A. 6a).

Delta, a Georgia-based corporation, is incorporated in Delaware and is qualified to do business in Florida. The company is certificated as an interstate common carrier by the Civil Aeronautics Board and is engaged in flying passengers, cargo and mail over a route system that extends throughout the United States, and to Canada, Nassau, Bermuda, and Europe. Delta served 9 airports in Florida at the time this action was brought, (R. 625), and currently serves 12 airports in the State. Delta pays substantial taxes in Florida including income taxes, sales taxes and intangibles taxes. (R. 625, 655).

THE PROCEEDINGS BELOW

In its complaint in the Circuit Court for the Second Judicial Circuit, Leon County, Florida, Delta sought an injunction against the DOR from enforcement of the new tax scheme and a declaration that the new fuel tax was repugnant to the Florida and United States Constitutions.[5] (R. 50). An evidentiary hearing was held in which Delta presented evidence that the fuel tax imposed

[5] Prior to the hearing for a preliminary injunction, the airlines who participated in this law suit and the DOR agreed to an arrangement under which the airlines escrow the tax money or post a bond for the cumulative tax accrued.

by Chapter 83-3 was a user tax, and that as such, the fees were manifestly disproportionate to the services rendered; that the price of aviation jet fuel was consistently lower than the price of gasoline; and that airlines bore all but minor costs of construction and maintenance of the state's commercial airports. (R. 661-688, 863). The circuit court entered a final judgment, ruling that Chapter 83-3 did not violate Delta's equal protection rights under the United States Constitution or the Constitution of the State of Florida; and furthermore, that the law did not contravene the commerce clause of the United States Constitution. (A. 25a-37a).

Delta appealed to the District Court of Appeal, First District of Florida, and requested that the appeal be certified by the district court to the Florida Supreme Court as a matter of great public importance and of great effect on the proper administration of justice throughout the state. The district court certified the case for immediate resolution by the Florida Supreme Court.

On appeal, the Florida Supreme Court examined the question of the validity of Chapter 83-3 in a series of cases filed by airlines.[6]

Delta raised a number of issues in its appeal. Delta asserted that Chapter 83-3 violated its right to equal protection: by taxing aviation fuel at a rate higher than the rate applied to other fuel; by taxing airlines differently than railroads and vessels without any rational basis for the distinction; and by giving home-based carriers an income tax credit to which non-Florida carriers were not entitled. Delta also asserted that Chapter 83-3 violated the commerce clause of the United States Con-

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[6] Most of these cases involved challenges by foreign airlines based on executive and international agreements. Two cases involved domestic issues: the present case and *Eastern Air Lines, Inc. v. Department of Revenue, supra.* Both of these opinions are reprinted in the Appendix.

stitution by imposing a road-user tax which was totally unrelated to the services provided by the state to interstate airlines and which discriminated against interstate commerce, and by providing an income tax credit only to home-based carriers.

The Florida Supreme Court rejected Delta's equal protection claims by adopting its holding in *Eastern Air Lines, Inc. v. Department of Revenue*, (A. 13a-23a), that the classification of airlines differently from railroads and vessels was not "hostile and oppressive discrimination" and that the predetermined price structure did not discriminate against airlines or interstate commerce. (A. 16a). The court did not directly address the equal protection issue raised by the home-based carrier income tax credit, because it found that the credit violated the commerce clause and struck that provision of the Act. (A. 6a).

In holding that the sales tax on fuel was not a road-user tax, the Florida Supreme Court totally disregarded evidence presented to the circuit court, and adopted a label dispositive analysis of this issue. The court applied *Commonwealth Edison Co. v. Montana, supra*, and held that "the excise tax on the *purchase* of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society." (A. 11a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE RESULT BELOW MISCHARACTERIZES THE TAX AND APPLIES THE WRONG COMMERCE CLAUSE STANDARDS OF CONSTITUTIONALITY

A state cannot avoid the constitutional limitations on its power to tax by changing the label of the tax. In Chapter 83-3, Florida's legislature has engaged in such label switching merely by moving its road-user tax from

Chapter 206, the fuel excise tax chapter, to the general sales tax chapter, Chapter 212, even though the funds remain earmarked for essentially the same purposes—the construction and maintenance of roads.

In this period of shifting of funding for many programs from the federal government to the states, the states have broadened their tax bases by imposing new and higher taxes. The design of these new taxes has often been shaped by political concerns. If a legislature can design a tax which will raise a large amount of perceived needed revenue from just a few corporations, that is more acceptable politically than a broad tax that affects many voters. But for the desire to raise an additional $50 million plus from the airlines, the Florida Legislature could have left the First Gas Tax in Chapter 206 and increased it from 4 cents to 5.7 cents per gallon. But, it was obvious to those who drafted Senate Bill 8-A that the First Gas Tax which was clearly a "road-user" tax could not be applied to airlines. By moving this tax to Chapter 212, the sales tax chapter, the drafters decided the tax could be applied to airlines also, for airlines are surely subject to a general sales tax like every other consumer. But is this a general sales tax?

Regardless of the shell game played by the Legislature, this tax is still a road user tax and applying the new road-fuel sales tax to Delta's purchase of jet fuel places the type of undue burden on interstate commerce prohibited by the Court's prior user tax decisions and, more especially, by the "fairly related" requirement, the fourth prong of the *Complete Auto Transit* test. In that case, the Court established a four prong test to determine whether a state tax comports with the commerce clause. Under this test a tax is constitutional if it: "[1] is applied to an activity with a substantial nexus with the taxing State; [2] is fairly apportioned; [3] does not discriminate against interstate commerce; and [4] is fairly

related to services provided by the State." (Numerals added). 430 U.S. at 279.

Over the last half century, this Court has developed a body of principles relating to a state's power to tax both instrumentalities of interstate commerce and those activities which affect such commerce. This evolution of commerce clause principles focuses on the *practical operation* of a challenged state tax scheme rather than relying on labels and artificial distinctions assigned by the taxing state. *See, e.g., Mobil Oil Corporation v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Complete Auto Transit, Inc. v. Brady, supra.* This enlightened approach has expanded the state's power to levy a *fair* tax on interstate commerce without emasculating the principles underlying the commerce clause. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). But interstate commerce need only pay its fair share, and a state tax that seeks to exact more than this just share runs afoul of the commerce clause. What constitutes a "just share" depends on the operating incidence and practical effect of the tax. As the Court has recently stated:

> In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' (Citations omitted).

Commonwealth Edison Co. v. Montana, supra at 616. The practical effect of the sales tax on fuel imposed in Chapter 83-3 is that it is really a "user" tax just as the old First Gas Tax. As such, this tax violates the commerce clause of the United States Constitution because it imposes more than a just share of the tax on airlines.

A state may tax an activity in interstate commerce to recover the costs attributable to that activity or to reimburse the state for the use of state-provided facilities. *See, e.g., Evansville-Vanderburgh Airport Authority Dist.*

v. Delta Air Lines, Inc., 405 U.S. 707 (1972). But when a state has chosen to tailor a tax to reflect a more direct relationship between the activities taxed and the facilities provided, as Florida has done in Chapter 83-3, this Court has carefully examined this type of tax to ensure that it is not a disguised attempt to impose a burden on interstate commerce manifestly disproportionate to the specific services rendered or the facilities provided. *Id.* at 717; *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599; (1939); *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 260 (1919); Hartman, *Federal Limitations on State and Local Taxation*, 665-667 (1981).

The Florida Supreme Court either misunderstood or ignored these bedrock principles. Its superficial, out-dated commerce clause analysis represents a victory of form over substance and raises important questions concerning the application of commerce clause principles to the taxing scheme created by Chapter 83-3. The court determined that the tax (imposed by Chapter 83-3) is an "excise tax".[7] Characterizing the tax as a sales tax imposed on the privilege of engaging in certain businesses and on all purchasers of motor fuel or special fuel on the incident of first withdrawal, the court applied out-of-date commerce clause cases and concluded that the tax was not a road-user tax. (A. 7a).

But the term "excise tax" is a generic term applied to a tax levied on the manufacture, sale or consumption within the taxing jurisdiction. The term includes both

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[7] In characterizing the tax as a valid "excise tax", the Florida court relied upon *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249 (1933), *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933) and *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932), where the Court upheld sales and use taxes imposed upon fuel purchased or used by interstate carriers as not violative of the commerce clause, using the direct/indirect burdens analysis.

general revenue taxes and "user" taxes. Both the taxes imposed under Chapters 206 and 212 are excise taxes, as was the tax imposed in *Evansville-Vanderburgh Airport*, so the characterization of the new tax as an excise tax is not dispositive of the question raised.

The Court, in *Complete Auto Transit, Inc. v. Brady, supra*, repudiated the artificial distinctions relied upon in the 1930's and later cases. Rejecting the *Spector*[8] rule because it had no relationship to economic reality and stood only as a trap for the unwary draftsman, the Court established the four prong test to determine whether a state tax comports with the commerce clause. But would this test have any meaning in the 1980's if the states were permitted to rely upon characterizations of taxes established by this Court in the 1930's using the old direct/indirect analysis?

While the Florida Supreme Court apparently recognized that the *Complete Auto Transit* test was the appropriate standard to be applied in testing a tax under the commerce clause, it incorrectly felt that it was bound by the characterizations of similar taxes established in the 1930's cases. Distinguishing the tax from the user fee or user tax in *Evansville-Vanderburgh Airport Authority Dist.*, and finding the tax analogous to the general revenue tax in *Commonwealth Edison Co. v. Montana, supra*, the court held that the tax on purchases of fuel is fairly related to purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an orderly society.

In *Commonwealth Edison Co.*, this Court expressly reserved addressing the meaning of "fairly related" as applied to a user tax when it stated:

> . . . [W]e put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes"

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[8] *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

> that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. (Citations omitted).

Id. at 621. This case deals with such a tax.

The tax created under Chapter 83-3 is clearly a road-user tax, *i.e.*, one established to tax road-users for road building and repairs. The fuel tax scheme established by Chapter 83-3 shares all the significant traits of a user tax: (1) It is levied at a group of identified users of public facilities; (2) there is a direct relationship between the tax, the cost of providing the service or facility and the corresponding benefit to the user; (3) it can be avoided by non-use (or non-users can qualify for exemptions or refunds); and (4) it may affect public behavior by discouraging the taxed activity.[9]

Indeed, gasoline taxes have long been recognized as a special type of excise tax imposed on highway users to pay for highway construction and maintenance. The federal gasoline tax is a prime example of a road-user tax, which tax has been deposited in the Federal Highway Trust Fund since 1956 to pay for the interstate highway system. Peckman, *Federal Tax Policy*, 142, 147 (1966). Florida's fuel tax under Chapter 83-3 continues to impose a similar levy on the users of Florida's highways,[10] with the revenue collected deposited in the Transportation

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[9] At trial these generally accepted traits of user taxes were identified by Dr. Kenneth Small of Princeton University, an expert in transportation economics and taxation. Dr. Small expressed his expert opinion that Chapter 83-3 creates a typical road-user tax whose operating incident fell on users of Florida's highways. (R. 688-691).

[10] The statutory scheme exempts (or allows refunds) to classes of non-road users, *e.g.*, railroads and vessels, agricultural users, commercial users, home-heating users, off-the-road users and commercial fishing users. Fla. Stat. §§ 206.87(3), 212.08(4)(a)(2), 212.67(1)(c) (1983).

Fund primarily to be used for highway construction and maintenance.

The Florida Supreme Court, however, ignored these economic realities established by the uncontroverted evidence of record and blindly accepted the Legislature's artificial characterization of the fuel tax as a general revenue excise tax.[11] But this Court should not and need not accept the labels given the fuel tax by the Florida Supreme Court and the Florida Legislature. As the Court has explained:

> . . . [T]he descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' (Citations omitted).

Wisconsin v. J. C. Penney Co., 311 U.S. 435, 443 (1940).

When analyzing a tailored revenue measure intended to recover the cost of state-provided facilities from the direct beneficiaries of those facilities, the focus must be more precise than the inquiry appropriate for a general revenue tax. It follows that for a road-user tax like Florida's fuel tax, the fourth prong demands that the measure and amount of the tax be fairly related to the taxpayer's use of the state-provided highways. Florida's tax on jet fuel falls far short of satisfying these commerce clause requirements. Delta and other similarly situated airlines do not use Florida's roads.[12]

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[11] Dr. Small testified in the circuit court that Florida's fuel tax operates identically to a toll road or toll bridge. The only difference, according to Dr. Small, is that the toll is collected at the service station rather than at the toll booth. (R. 686-687).

[12] Obviously, Delta receives a general benefit from roads to the same extent as other non-road users. Roads lead to airports, as they do to train stations, ports, farms and shopping centers. Under Florida's functional equivalent of a road-user tax, however, these

For the above reasons, Florida's functional equivalent of a road-user tax, as applied to non-road users such as Delta, raises important questions under *Complete Auto Transit* and *Commonwealth Edison Co.* that this Court should address.

II. CHAPTER 83-3 DISCRIMINATES AGAINST INTERSTATE COMMERCE BECAUSE IT TAXES AIRLINES AT A HIGHER RATE THAN OTHER TAXPAYERS

Chapter 83-3 not only taxes airlines for highways they do not use, but taxes airlines at a higher rate than the road users who do benefit from the tax. The artificially established price of fuel upon which the tax is applied discriminates against interstate commerce and violates the third prong of the *Complete Auto Transit* test.

The Court found in *Commonwealth Edison Co.* that the severance tax comported with the third prong of the test even though 90% of Montana's coal was shipped out of state, because all taxpayers paid at the same rate, regardless of the final destination of the coal and the tax burden was borne according to the amount of coal consumed. Unlike Montana's severance tax, not all taxpayers are taxed at the same rate under Florida's Chapter 83-3. By establishing a predetermined price per gallon upon which the tax is based, the Act effectively taxes airlines, who use lower price jet fuel, at a higher rate than gasoline purchasers.

The Florida Supreme Court made no inquiry as to the appropriateness of the measure, but merely stated that the predetermined price is acceptable because it is imposed on all consumers equally, thereby ignoring its dif-

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roads are paid for by the direct users. Delta's passengers pay for these roads in the tax on the fuel used in their vehicles. Charging Delta a tax for the roads, which is passed on to passengers in airline fares, creates a double tax on the passengers

ferential impact on Delta and other airlines. (A. 17a). The court held that there is no merit in the argument "that the predetermined price structure invidiously discriminates against airlines." *Id.* But Delta had presented evidence to the circuit court that the effective rate of taxation on airline jet fuel was 6.3 percent while gasoline users (motorists) were taxed at an effective rate of 5 percent. The tax on aviation jet fuel, used primarily in interstate commerce, pegged to the higher average retail price of gasoline, used primarily in intrastate commerce, raises important questions which this Court should address under the third prong of the *Complete Auto Transit* test.

III. THERE WAS NO RATIONAL BASIS FOR TAXING AIRLINES DIFFERENTLY THAN RAILROADS AND VESSELS

Section 5 of Chapter 83-3 creates two classifications of common carriers for taxing purposes: (1) airlines, and (2) railroads and vessels. Airlines are taxed on fuel purchases like motorists at 5 percent of $1.148 per gallon for all fuel purchased while railroads and vessels continue to pay a prorated tax for fuel used in the state based on their actual fuel costs.

In viewing the tax changes wrought by Chapter 83-3 in their entirety, it is evident that Florida has arbitrarily singled out nonresident interstate air common carriers, like Delta, to pay a substantial portion of the costs of constructing and maintaining Florida's highway system. This arbitrary classification scheme denies Delta, and other similarly situated airlines, equal protection of the laws in violation of the fourteenth amendment. As this Court warned:

> . . . [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and

> may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation.' (Citations omitted).

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). In Chapter 83-3, Florida has gone beyond the allowable point and exceeded the outer limits of rationality.

The Florida Supreme Court adopted the circuit court's conclusion that no hostile and oppressive discrimination had been made by the Legislature in classifying airlines differently from other interstate common carriers. "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." (A. 31a). The circuit court found as a basis for distinction that airlines are exempt from ad valorem tax on their leasehold interests at airports. The DOR had argued that this constituted a justification for applying the new tax to air carriers because the DOR alleged that the airports were built using local tax funds; but that premise is incorrect. The record reflects evidence that the airports are built and maintained almost exclusively through funds provided by the airlines; and that little or no local or state funds are expended for airport construction or operation. Conversely, the airlines support many general aviation airports which are included in airport authority budgets. Furthermore, *all* lessees of governmental property in Florida are exempt from ad valorem tax and subject to a state intangibles tax on such interests, not just airlines.

Even if the exemption from ad valorem tax had been established as the legislative basis for the classification, the classification would have been invalid. The absence

of a local ad valorem tax hardly constitutes a rational basis for classification of airlines differently than railroads and vessels for purposes of imposing a state tax on fuel used for road building.

This Court has conceded the necessity of treating airlines, vessels and railroads similarly for tax purposes. In *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), and *Eastern Air Transport v. South Carolina Tax Commission, supra*, the Court held that there was no constitutional basis for distinguishing airlines from railroads or watercraft in imposing taxes.

No rational basis has been established to support the Florida Legislature's classification of airlines as subject to the road-tax under Chapter 83-3 and excluding similarly situated carriers, *i.e.* railroads and vessels. While state legislatures enjoy broad discretion in establishment of classes for taxation, that discretion cannot be unbridled. The equal protection provisions of the fourteenth amendment require some rational basis for this type of distinction and raise important questions which the Court should address.

IV. THE CUMULATIVE IMPACT OF CHAPTER 83-3 VIOLATES DELTA'S EQUAL PROTECTION RIGHTS AND THE COMMERCE CLAUSE

The Florida Governor's call for massive infusions of revenue for Florida's roads was met by the enactment of Chapter 83-3. But in the legislative process this law evolved to impact only two groups: (1) motorists and motor carrier road-users, and (2) non-road-user airlines. And of the latter, the impact was softened to reflect a concern for two Florida-based carriers, by providing an income tax credit for half their fuel tax. This legislation is a perfect example of special interest legislation at its

worst. Not only are airlines taxed while other similarly situated common carriers are not, but the impact of the tax, because of the huge volume of fuel used by airlines, causes these few taxpayers to bear a major burden of Florida's road building. This bill was tailored to raise the requested funds and to avoid the voter reaction to a large gas tax increase imposed on motorists. But south Florida legislators were concerned about the full impact of this massive tax on their two Florida-based carriers, Eastern Air Lines, Inc. and Air Florida, Inc. Railroads and vessels lobbied successfully to block their inclusion.

The resulting legislation labeled as a general revenue sales tax was a hodgepodge, imposing an excise road-user gas tax on motorists and airlines, and giving a special credit to two carriers. But a rose by any other name smells as sweet and this tax is a user tax regardless of the legislative label. Condoning this tax as constitutional merely licenses states to impose special purpose taxes based not upon the use of the facilities provided by the tax, but upon the ability to pay and the political vulnerability of the taxpayer. The United States Constitution forbids such!

This Court has recognized the need for a clear and logical analysis of the real impact of a tax in the development and adoption of the *Complete Auto Transit* commerce clause test. In *Commonwealth Edison Co.*, this Court analyzed the meaning of the fourth prong of that test as applied to a non-discriminatory general revenue tax. This case begs the Court's analysis of that test as applied to a discriminatory special purpose user tax and offers the opportunity for the Court to establish tests whereby state courts and legislatures may be guided as to the proper labeling, and therefore the proper scope, of state taxes impacting interstate commerce. The *Complete Auto Transit* test was a major development in the removal of artificial and semantic tests for the constitu-

tionality of a tax. But the virtues of this test can be nullified if state courts and legislatures can circumvent the test by artful labeling of the tax.

The Florida Supreme Court recognized that the Florida-based carrier tax credit unfairly discriminated against interstate commerce and struck it down. But the court accepted the legislative labeling of the tax, and influenced by the determination that similar taxes were not unconstitutional in the 1930's, decided that this tax, minus the credit, stands constitutional muster. This case raises substantial and fundamental questions under the commerce clause and the equal protection clause of the fourteenth amendment to the United States Constitution which should be reviewed by this Court.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF FLORIDA

No. 63,915

DELTA AIR LINES, INC., *et al.*,
Appellants,

v.

DEPARTMENT OF REVENUE,
Appellee.

[June 14, 1984]

ADKINS J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Delta Air Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District

Court of Appeal which certified the case for immediate resolution by this Court.

We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in *Eastern Air Lines v. Department of Revenue*, No. 63,949 (Fla. June 14, 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of chapter 83-3 creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Taxes have been sustained against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. No state may, consistent with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax*

Commission, 429 U.S. 318, 329 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). This principle follows from the basic purpose of the commerce clause which is to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. *Boston Stock Exchange*, 429 U.S. at 329; *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

In *Boston Stock Exchange* the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of $350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332.

Another tax statute whose discriminatory credits and exemptions provided the basis for a finding of unconstitutionality was the Louisiana statute reviewed in *Maryland v. Louisiana*, 451 U.S. 725 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the state from the outer

continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the discriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759.

The circuit court here found that "the tax is on fuel purchased *in* the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in *Maryland v. Louisiana.* The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found *Boston Stock Exchange* inapplicable stating that, in the present case, "the legislature is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in *Boston Stock Exchange.* The United States Supreme Court in *Boston Stock Exchange* was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored in-state business and discriminated against interstate commerce.

The circuit court also relied on *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982). In *Archer Daniels* the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemption for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. *Id.* at 599. The circuit court ruled that *Archer Daniels* dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.

The circuit court continued its erroneous analysis under the commerce clause by referring to *Faircloth v. Mr. Boston Distiller Corporation*, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The court's reliance on *Faircloth* is misplaced because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In *Eastern*, No. 63,949 (Fla. June 14, 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220.189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose—to tax corporations qualified to do business in Florida or actually doing business in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an *excise* tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's argument is that this tax is a *user* tax and, as such, fails the fourth prong of the text enunciated in *Complete Auto*. Delta argues that it and other interstate air common carriers do not use the roads in Florida and, therefore, the measure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. *All purchasers* of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933). The proceeds of the tax were to be used solely in the construction and maintenance of a highway system in the state. The appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. *Id.* at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective *use* as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*,

> supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

Id. at 268.

In *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1931), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, of or the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

Id. at 153.

Similarly, the Court upheld a Wyoming law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1932). The Court described the tax in the following manner:

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct. 279." As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Id. at 252 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 269 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981); *General Motors Corp. v. Washington*, 377 U.S. 436, 440-41 (1964). The relevant inquiry under the fourth prong of the *Complete Auto* test is not, as Delta seems to suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. *Commonwealth Edison*, 453 U.S. at 625. The first prong of *Complete Auto* clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before *any* tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. *Id.* at 626; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in *Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc.*, 405 U.S. 707 (1972). In *Evansville-Vanderburgh* the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in *Commonwealth Edison* where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of *Complete Auto.* First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621. The Court also concluded that the fourth prong of *Complete Auto* was satisfied by the Montana tax. The Court stated:

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

Id. at 626 (citing *General Motors Corp. v. Washington,* 377 U.S. at 440-41).

We believe the imposition of this excise tax on the *purchase* of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must

disagree with Delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-761—Certified by the District Court of Appeal, First District, Case No. AT-266

J. Michael Huey and Stephen A. Ecenia of Akerman, Senterfitt and Eidson, Tallahassee, Florida, for Delta Air Lines, Inc.; and Darrey A. Davis and Juan T. O'Naghten of Steel, Hector and Davis, Miami, Florida, for Pan American World Airways, Inc.,

Appellants

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Tallahassee, Florida,

for Appellee

SUPREME COURT OF FLORIDA

No. 63,949

EASTERN AIR LINES, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

[June 14, 1984]

ADKINS, J.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitutions, was an unconstitutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pendency of the proceedings subject to certain conditions. The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered

in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eliminates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, § 5 (amends § 212.08(4), Fla. Stat. (Supp. 1982)). Section 4 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power for energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport

persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83 (1940); *Just Valua-*

tion & Taxation League, Inc. v. Simpson, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> § 212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:
>
> (a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period be-

ginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes an improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions, the Secretary of Labor has broad powers to collect, collate and report statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them.

More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seem wise." 29 U.S.C. § 2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from *Gindl* because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the department, in arriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in *State v. Welch*, 279 So.2d 11 (Fla. 1973).

In *State v. Welch*, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to include under that chapter "all drugs controlled by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. § 404.515, Fla. Stat. (Supp. 1972). In

Welch this Court looked to the rule of law announced in *Freimuth v. State*, 272 So.2d 473 (Fla. 1972). There, the the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. *Id.*

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of *Welch* and *Freimuth* should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a consumer price index which is to be determined *after* the effective date of the act. In *Gindl* we upheld a statutory provision which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to

take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of appropriation in chapter 83-3 is equivalent to the method approved in *Gindl*.

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> § 212.92 Refunds.—
>
> (e) Refund to farmers and fishermen.—
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.
>
> 2. For the purposes of this paragraph, 'commercial fishing purposes' shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but

shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to challenge chapter 83-3's full refund provisions, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the *fishing* or *farming business* and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In *State ex rel. Clarkson v. Philips*, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results

unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in *Presbyterian Homes of Synod v. Wood*, 297 So.2d 556 (Fla. 1974), wherein the Court stated:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separted from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit court.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-855— Certified by the District Court of Appeal, First District, Case No. AT-359

Joseph F. Jennings of Kimbrell, Hamann, Jennings, Womack, Carlson and Kniskern, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 12, 1984

Case No. 63,915

Circuit Court Case No. 83-761 (Leon)

DELTA AIR LINES, INC., *et al.*,
Appellants,

vs.

DEPARTMENT OF REVENUE,
Appellee.

On consideration of the motion for rehearing and/or clarification, and response thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

A True Copy

TEST:

SID J. WHITE
Clerk, Supreme Court

By: /s/ Debbie Causseaux

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Ben C. Willis, Chief Judge

J. Michael Huey, Esquire and
William L. Hyde, Esquire of
Akerman, Senterfitt & Eidson
Joseph C. Mellichamp, III, Esquire
Larry Levy, Esquire
Darrey A. Davis, Esquire of Steel,
Hector & Davis

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 83-761

DELTA AIR LINES, INC., a Delaware Corporation, *et al.*,
Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, *et al.*,
Defendants.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and argument of counsel for the respective parties, and on the briefs of counsel for the parties, intervenors and amicus curiae, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Florida Statutes, titled "an act relating to transportation finance and administration" violates

a) its constitutional right to equal protection under the United States and Florida Constitutions,

b) the Commerce Clause of the United States Constitution,

c) Article III, Sections 10 and 11 of the Florida Constitution.

Intervenor Eastern Airlines also asserts Senate Bill 8-A is an improper delegation of legislative authority. Plain-

tiff prays for declaratory and injunctive relief to prevent Defendant Department of Revenue (DOR) from assessing and collecting such tax.

2. Senate Bill 8-A was signed into law on March 8, 1983 to become effective April 1, 1983. It revises the tax structure of Chapters 206, 212, and 220, Florida Statutes. Prior to the enactment of said Bill motor fuel was taxed pursuant to Part I, Chapter 206 at the rate of 8 cents per gallon as follows:

a) a "first gas tax" of 4 cents to be used for maintenance and construction of state road,

b) a "second gas tax" of 2 cents to be used by counties to secure bond obligations,

c) a "seventh-cent tax" used by counties for public transportation, and

d) an "eighth-cent tax" used by municipalities for transportation-related expenditures.

Prior to the enactment of Senate Bill 8-A special fuel was taxed pursuant to Part II, Chapter 206 at the rate of 8 cents per gallon with distribution the same as Part I, Chapter 206. Aviation fuel was exempt from Part II.

Prior to the enactment of Senate Bill 8-A, pursuant to Chapter 212, common carriers paid a sales tax of 5% of the sales price of fuel, such tax accruing and being collected upon first withdrawal from the storage facility. This tax was prorated according to the ratio of the interstate mileage of the carrier to its total mileage for the previous fiscal year.

Prior to the enactment of Senate Bill 8-A, Chapter 220 imposed an income tax on corporations without credit for motor or special fuel taxes paid.

3. Senate Bill 8-A eliminates the "first gas tax" of Part I, Chapter 206 in 206.41 and reduces the special fuel tax in Part II from 8 cents to 4 cents. Distribution

is the same as prior to enactment. Thus, under both Part I and Part II of Chapter 205 the tax is reduced from 8 cents to 4 cents per gallon.

Under Chapter 212, the Bill now imposes a 5% sales tax on motor and special fuel based on a predetermined price of $1.148, or 5.7 cents, per gallon until June 1, 1985, at which time the DOR will determine the price according to the most recent Consumer Price Index. Distribution is for "transportation purposes" per Section 206.46 from a Transportation Trust Fund. The Chapter 212 tax upon common carriers will continue to be prorated by intrastate mileage; however airlines will be taxed on all aviation fuel purchased in Florida, regardless of use in interstate or intrastate travel. Chapter 220 now affords a 50% or $5 million (the lesser) credit to Florida-based corporations with 1,200 or more employees.

4. Plaintiff objects to Senate Bill 8-A on the grounds it violated equal protection by subjecting them to different tax treatment than other common carriers, creates a classification which is discriminated against by higher tax rates, subjects them to a predetermined price not related to the actual price of aviation fuel, and discriminates against foreign corporations by allowing the Chapter 220 tax credit only to corporations with their corporate or home office in Florida.

Plaintiff alleges Senate Bill 8-A violates the United States Constitution Commerce Clause by exceeding the state limitations in taxing interstate commerce because the apportionment is unfair and not based on intrastate use, agricultural and fishing interests are favored by total fuel tax exemption, the tax credit is an attempt to force corporations to establish corporate offices in Florida, there is no nexus between the tax on airlines and the use of funds for roads, and the tax is not fairly related to services provided to interstate airlines.

Plaintiff originally claimed Senate Bill 8-A violated Article III, Sections 10 and 11 of the Florida Constitu-

tion because it was a special law. However, in light of the recent Supreme Court decision in *Department of Legal Affairs, State of Florida, et al. v. Sanford-Orlando Kennel Club, Inc.*, 8 F.L.W., (Fla. April 14, 1983), in which the Court stated it did not matter that the legislature was aware the bill would benefit a certain business, Plaintiff has abandoned this allegation. Plaintiff had originally prayed for attorneys fees pursuant to 42 U.S.C. 1983 and 1988, which issue this court ruled against in a hearing May 11, 1983.

5. Plaintiff Delta Airlines is a Delaware corporation registered to do business in Florida and certified by the Civil Aeronautics Board. They operate from 9 airports in Florida and employ approximately 4,000 employees. Intervenors are various airlines subject to the fuel tax whose aggregate employees number approximately 1,800. None of the intervenors are qualified to receive the Chapter 220 tax credit either because of size or location outside Florida. Delta claims irreparable injury of $9.7 million per year without retroactive interest if Senate Bill 8-A is declared unconstitutional, prolonged legal proceedings, invidious discrimination without remedy, and competitive advantage to other classes of common carriers and Florida-based corporations. For these reasons, Plaintiff requests an immediate temporary injunction followed by a permanent injunction and declaratory relief.

6. Defendant DOR contends Senate Bill 8-A is a valid tax measure reasonably related to the legitimate state purpose of stabilizing tax structures and therefore is not subject to the constitutional infirmities urged by Plaintiff. Defendant contends that it has long been established that sales and use taxes imposed for the privilege of engaging in business in the state are valid. *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Kirk v. Western Contracting Company, Inc.*, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535, app. dism. 226 So.2d

815: *Florida Revenue Commission v. Maas Brothers, Inc.*, 226 So.2d 849 (Fla. 1 DCA 1969), cert den. 237 So.2d 177. Plaintiff elaborates on the point that Senate Bill 8-A is a user fee and not fairly related to the airlines use of public facilities or roads. However, as Defendant points out, this is an excise tax, not a user fee, and "the constitutional power to levy taxes does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933) at page 269.

EQUAL PROTECTION

The three main areas of Plaintiff's complaint in the equal protection area are: partial exemptions to other common carriers, predetermined price unrelated to actual price of aviation fuel, and discriminatory tax credit structure.

First, Plaintiff asserts that all common carriers should be treated alike and airlines should also receive the prorated treatment under Chapter 212 that other common carriers receive. Plaintiff cites cases to support this assertion that interstate carriers are "similarly situated" for tax purposes, *Seaboard Air Line Ry. v. Simon*, 47 So. 1001 (Fla. 1908) where all carriers are liable for lost or damaged goods; *Braniff Airways, Inc v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954) that imposition of taxes on aircraft must be the same as for riverboats; *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) that water transportation taxed same as other carriers; *Delta Air Lines, Inc., v. State of Alabama*, No. CV-1162 (Cir. Ct. Montgomery, Ala. May 27, 1981) that airlines are not utilities and receive the same treatment as other transportation modes. Defendant counters that states have wide latitude in taxation and creating classifications. In *Madden v. Kentucky*, 309 U.S. 83 (1940) the Supreme Court stated at page 88:

> "In taxation even more than in other fields, legislatures possess the greatest freedom of classification."

The Supreme Court has upheld tax classification in ad valorem taxation of corporations, *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973), reh. den. 411 U.S. 910; and exempting non-residents from ad valorem taxes on merchandise held in warehouses, *Allied Stores of Ohio v. Bowers*, 348 U.S. 522 (1959), where the Court states there is "no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable scheme of state taxation", p. 526.

The courts of Florida have followed *Lehnhausen*, *Madden*, and *Allied Stores* in *Markham v. Yankee Clipper Hotel, Inc.*, et al., 427 So.2d 383 (Fla. 4th DCA, 1983); and in *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229 (Fla. 1968), in which the Florida Supreme Court states at p. 232:

> "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The Florida Supreme Court has upheld the constitutionality of Chapter 212 in *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950) where a 3% tax was imposed on rentors and lessors of living quarters, but accommodations rented for longer than 6 months and two-family apartment buildings were exempt. The court held this to be a reasonable classification. Likewise the distinction between airlines and other carriers is a reasonable classification and Plaintiff has not sustained its burden to "negative every conceivable basis which might support it". *Just Valuation*, supra.

Plaintiff maintains that this distinction is arbitrary and unreasonable and will not pass constitutional muster,

citing *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459 (1937), to support the allegation that two different forms of business cannot be treated differently. Plaintiff states that airlines and common carriers have been treated similarly for fuel tax purposes since 1963, and that the new bill singles out airlines to pay a disproportionate share of tax. However, Plaintiff does not sustain its burden to demonstrate this classification is "hostile and oppressive" per *Just Valuation*, and this court therefore holds there is no invidious discrimination by creation of an arbitrary classification. Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature. For example, airlines enjoy the advantage of being exempt from ad valorem taxes on the lease of property from the county or other governmental units pursuant to Chapter 80-368. Vessels and railroads are not exempt. Even though Plaintiff argues that 80-368 also benefits hotels, restaurants, and racetracks, it does not object to this favorable classification and only when disadvantaged does Plaintiff object. Also, proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage. Defendant approximates that in the past airlines were paying only about 6% of their actual tax due to these flight patterns to avoid flying over the state.

Second, Plaintiff asserts the predetermined price of $1.148 per gallon is not related to the actual price of aviation fuel which customarily is less expensive and at the time of writing was about $.90 per gallon. Plaintiff would have the DOR adjust the price as market price fluctuates and tax aviation fuel at the lower rate. This suggestion is not feasible because of the varying prices in different locations, the volatile nature of gas prices, and the objective of the legislature to have a stabilized tax structure. Rather than discriminate against airlines, the

legislature has imposed a set price per gallon and all consumers are taxed equally regardless of nature of transport. The tax is levied on first withdrawal from the storage tanks and not at the retail level which latter price would be relatively impossible to ascertain. Plaintiff urges the court to allow the airlines to self-assess taxes as in the past and insists there have been no problems previously. However, as DOR points out, the discrepancy in self-assessment renders this point meritless. For the foregoing reasons, this court holds the predetermined price structure does not invidiously discriminate against airlines.

Third, Plaintiff maintains the Chapter 220 tax credit structure favors local business and disadvantages foreign corporations registered in Florida but without a home office there. Plaintiff cites *Department of Revenue v. Amrep*, 358 So.2d 1343 (Fla. 1978) for the proposition that once a corporation is admitted to be registered in a state, it enjoys the full equal protection of the law. This is true, but it also must bear the cost of being privileged to do business in the state. Plaintiff contends that state attempts to tax foreign corporations more stringently than domestic corporations have been invalidated in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949) dealing with intangible tax on accounts receivable; and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) which afforded out-of-state non-profit corporations tax exemptions equal to domestic non-profit corporations; and *O'Connell v. Kontojohn*, 179 So. 802 (Fla. 1938) which invalidated a discriminatory Pensacola tax based on non-city residents who operated bakery trucks in that city. However, the Senate Bill 8-A tax credit is valid because there is a rational basis behind allowing such credit for domestic corporations: encouraging foreign corporations to establish home offices in Florida. Further, the Supreme Court states in *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) at page 509:

> "The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

Therefore, if the legislature reasonably believes a tax credit for domestic corporations will further its objective of encouraging in-state incorporation, it may afford this more favorable treatment without discrimination. Just as the legislature enjoys wide latitude in taxation and classifications, it has wide latitude in promoting business where the public interest is served. *Carmichael* at page 512. In *Sanford-Orlando Kennel Club*, supra, the Florida Supreme Court states that the legislature may benefit a certain class so long as it is not unreasonable. There is no unreasonable burden on airlines to establish a home office in Florida if they wish to receive a tax credit. Also, this tax credit is on corporation income tax, not on the sales tax, so a corporation must first pay corporate income tax to avail itself of the Chapter 220 credit. For these reasons, this court holds the tax credit does not favor local business nor discriminate against foreign corporations.

COMMERCE CLAUSE

Plaintiffs contend that Senate Bill 8-A is a state attempt to regulate commerce between the states and exceeds state limitations pursuant to the United States Constitution, Article I, Section 8, Clause 3 grant to Congress. Assuming this bill affects interstate commerce, the state tax must meet the four prongs of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), set out on page 278 of that opinion:

1) activity taxed has a sufficient nexus with the State,

2) the tax may not discriminate against interstate commerce,

3) the tax must be fairly apportioned; and

4) the tax must be related to services provided by the state.

Plaintiff contends that Senate Bill 8-A fails at least two prongs of this test because this is a road use tax unrelated to airline services, and because the tax is not fairly apportioned and favors certain carriers and local businesses Plaintiff insists this is a "user" tax because Governor Graham called this session to raise $250 million to fund road construction and maintenance. However, the wording of section 206.46 specifically eliminated reference to "construction and maintenance of state roads" in allocation funds from the State Transportation Trust fund into which the fuel taxes are deposited. Instead, the section is worded to provide funds for "transportation purposes" which includes airports and aircraft services, contrary to the assertion of Plaintiff. Plaintiff maintains that because these funds are used for roads and airlines do not use roads, the tax is unrelated to services provided by the state. This is obviously not the case, as the legislature expressly included all transportation purposes in the allocation of funds.

Plaintiff attempts to convince the court that this is a user tax and not an excise tax and is therefore subject to a higher standard of scrutiny. This argument is flawed. As previously noted, favoring local businesses is not necessarily unreasonable or arbitrary. In the case of the Chapter 220 tax credit, Plaintiff is not unreasonably disfavored as there is a legitimate state purpose in encouraging corporate home offices to locate in Florida and to otherwise attract industry to the state. Plaintiff can merely incorporate in Florida if it wishes to receive the credit. Use of public airport facilities is a privilege the airlines enjoy and they should share the cost of these facilities so long as the cost is reasonable. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) supports this statement and goes on to say that courts should not inquire into the amount of the tax or value of benefit received. In *Montana*, a severance tax on coal mined in Montana was upheld as a general revenue tax

even though 90% was shipped out of state. Plaintiff tries to distinguish this case, saying Senate Bill 8-A is a use tax. However, this distinction does not withstand scrutiny. The court in *Montana* made it very clear that a state can regulate interstate commerce so long as there is no discrimination. In the case at bar the tax is levied upon all consumers equally based on the quantity of fuel withdrawn and there is no discrimination. The Supreme Court of the United States also deferred to the legislature in establishing tax measures in *Montana*. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), a "use" charge for enplaning passengers was upheld as rationally related to the use of facilities, even though such charge was "imperfect". Therefore, even if the Florida fuel tax were considered a use tax, this tax is valid because the funds are allocated for "public transportation" including air facilities, and according to *Montana* the benefit does not have to be measured with mathematical accuracy. The *Complete Auto* test prong #4 does not require a proportional relation of tax to benefit receive, but only requires that the tax be related to the services provided. *Complete Auto* also states that interstate commerce must pay its own way, similar to the reasoning in *Montana*.

To supports its contention that Senate Bill 8-A favors local business by extending a tax credit only to Florida-based corporations, Plaintiff cites *Maryland v. Louisiana*, 451 U.S. 725 (1981) where a tax on natural gas pumped out-of-state created a burden on interstate commerce. Here the tax is on fuel purchased *in* the state and all consumers are taxed equally so there is no similar burden on interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) involves a New York statute which taxed out-of-state transfers. Here the legislature is not trying to tax any out-of-state transactions. In *Archer Daniels Midland Co. v. State*, 315 N.W2d 597 (Minn. 1982), a tax exemption for

gasohol produced from Minnesota products with no comparable exemption for out-of-state product production, was declared invalid as a restriction on interstate commerce. Senate Bill 8-A in no way affects out-of-state production or consumption. The Florida Supreme Court has upheld special tax exemptions to encourage Florida industry. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240 (Fla. 1970). This court likewise finds there is no burden on interstate commerce by Senate Bill 8-A and no violation of the Commerce Clause.

IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY

Intervenor Eastern Airlines raises an additional point that Senate Bill 8-A is an improper delegation of legislative authority by allowing the DOR to determine the fuel fixed price after June 1, 1985. *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979, corrected on rehearing 1981) allows the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index. The method of appropriation in Senate Bill 8-A is equivalent to the *Gindl* method and is a proper delegation of authority.

SEVERABILITY

Both parties agree that this bill should not be severed in part. Additionally, there is no severability clause in the bill. However, in view of the rulings made herein, it is unnecessary to consider or determine any questions of severability.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution

(14th Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

B. It is further found that the reference to the Consumer Price Index in future applications of the price per gallon to be used in computing the tax is not an unlawful delegation of legislative power. The Consumer Price Index is a computation by governmental agency of average prices of items of commerce. Reference to this measure is not a delegation of legislative discretion but an economic computation relied upon to apply a legislative policy of a tax based upon an approximate price prevailing at a given time.

C. All challenges to the validity of this statute are found to be without merit.

D. All prayers that the Defendant Department of Revenue be restrained from enforcement of Chapter 83-3 or collecting taxes imposed thereon are hereby denied.

E. The Amended Complaint and this cause be and the same are hereby dismissed finally.

DONE AND ORDERED, this 23rd day of May, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Judge

Copies furnished to:

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Larry E. Levy, Esquire
Joseph C. Mellichamp, Esquire
Barry R. Davidson, Esquire
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Jack M. Skelding, Esquire
Ms. Helene Z. Cohen
James E. McDonald, Esquire

CHAPTER 83-3

SENATE BILL NO. 8-A [*]

Section 1. Subsections (21) and (22) are added to section 212.02, Florida Statutes, 1982 Supplement, to read:

212.02 Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

[(21) "Motor fuel" means and includes what is commonly known and sold as gasoline and fuels containing a mixture of gasoline and other products.**]**

[(22) "Special fuel" means any liquid product, gas product, or combination thereof used in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance. This term shall include, but not be limited to, all forms of fuel commonly or commercially known or sold as diesel fuel, kerosene, butane gas, or propane gas, and all other forms of liquefied petroleum gases.**]**

212.05 Sales, storage, use tax.—It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable, *according to the applicable brackets set forth in s. 212.12*, as follows:

---

[*] Words in italic type are deletions from existing law; bold bracketed words are additions.

(a)1. At the rate of 5 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale. Each occasional or isolated sale of an aircraft, boat, or motor vehicle of a class or type which is required to be registered, licensed, titled, or documented in this state or by the United States Government shall be subject to tax at the rate provided in this paragraph.

2. This paragraph does not apply to the sale of a boat by or through a registered dealer under this chapter to a purchaser who removes such boat from this state within 10 days after the date of purchase or, when the boat is repaired or altered, within 10 days after completion of such repairs or alterations. In no event shall the boat remain in this state more than 90 days after the date of purchase. This exemption shall not be allowed unless the seller:

a. Obtains from the purchaser within 90 days from the date of sale written proof that the purchaser licensed, registered, or documented the boat outside the state;

b. Requires the purchaser to sign an affidavit that he has read the provisions of this section; and

c. Makes the affidavit a part of his permanent record. In the event the purchaser fails to remove the boat from this state within 10 days after purchase or, when the boat is repaired or altered, within 10 days after completion of such repairs or alterations, or permits the boat to return to this state within 6 months from the date of departure, the purchaser shall be liable for use tax on the cost price of the boat and, in addition thereto, payment of a penalty to the Department of Revenue equal to the tax payable. This penalty shall be in lieu of the penalty imposed by s. 212.12(2) and is mandatory and shall not be waived by the department.

(b) At the rate of 5 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

(g) At the rate of 5 percent of the price, as determined pursuant to part II, of each gallon of motor fuel or special fuel taxable pursuant to said part, except that motor fuel and special fuel expressly taxable under this part shall be taxed as provided in paragraphs (a) and (b).

Section 5. Subsection (4) of section 212.08, Florida Statutes, 1982 Supplement, is amended to read:

212.08 Sales, rental, storage, use tax; specified exemptions.—The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this chapter.

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water)[, and], all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale[. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein.], *and* Motor fuels and special fuels *on which a tax is imposed by chapter 206 or chapter 207* [are taxable as provided in part II]. *All other fuels are taxable*, except that those used by vehicles[, other than aircraft,] which are licensed as common carriers by the Interstate Commerce Commission *or by the Civil Aeronautics Board* to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable [under this part] only to the extent provided

herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter. Alcoholic beverages and malt beverages are not exempt. The terms "alcoholic beverages" and "malt beverages" as used in this subsection shall have the same meaning ascribed to them in ss. 561.01(4) and 563.01, respectively. It is determined by the Legislature that the classification of alcoholic beverages made in this subsection for the purpose of extending the tax imposed by this chapter is reasonable and just; and it is intended that such tax be separate from, and in addition to, any other tax imposed on alcoholic beverages.

Section 6. Part II of chapter 212, Florida Statutes, consisting of sections 212.60, 212.65, 212.70, 212.80, 212.90, 212.91, 212.92, 212.94, and 212.95, is created to read:

212.60 Legislative findings and intent.—

(1) It is the intent of the Legislature that sales of motor fuel and special fuel shall be subject to the tax imposed by this chapter. However, in recognition of the unique business practices which characterize the sale of such fuel at the retail level, and of the existing public and private sector administrative structures which exist pursuant to chapter 206 for the collection of the motor fuel and special fuel excise tax, the Legislature hereby provides a method for imposing and collecting the sales tax on such fuel in a manner least likely to increase public and private costs of tax collection and administration.

(2) The Legislature hereby finds and declares that as a matter of convenience and necessity, the sales tax applicable to motor fuel and special fuel shall be levied and

collected as provided exclusively in this part. Provisions of part I shall be applicable to the taxation of motor fuel and special fuel only by express reference to such fuels and this part.

212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—

(1) A tax shall be imposed for the privilege of the sale at retail in this state of motor fuel and special fuel.

(2) (a) This levy of tax is upon the ultimate retail consumer. It is hereby provided as a matter of administrative convenience and necessity that the tax shall be paid upon the first sale or transfer of title within this state, whether by a distributor, dealer, or retail dealer, who shall act as agent for the state in the collection of said tax whether such distributor, dealer, or retail dealer is the ultimate seller or not.

(b) Distributors, dealers, and retail dealers shall add the amounts of the tax imposed under this part to the sale price and the tax shall be separately stated as Florida sales tax on charge tickets, sales slips, invoices, or other tangible evidence of sale to each subsequent purchaser. However, the sales tax imposed shall be disclosed to the ultimate retail consumer as provided in subsection (5).

(c) Distributors, dealers, retail dealers, or retailers shall not advertise or claim to the public by any manner whatsoever that they will absorb all or any part of the tax, that they will relieve the purchaser or ultimate consumer of any portion of the tax, or that a portion of such tax will be refunded.

(d) Any distributor, dealer, retail dealer, or retailer who violates the provisions of paragraph (b) or paragraph (c) shall be guilty of a misdemeanor of the second degree, punishable as provided in s.775.082, s.775.083, or s. 775.084.

(3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12th-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

212.80 Tax remitted to department.—The taxes levied and assessed pursuant to this part shall be remitted to the department at the same time as motor fuel and special fuel taxes are required to be remitted under the provisions of chapters 206 or 207. The department shall prescribe forms which provide for consolidated reporting of taxes due under chapters 206 or 207 and this part.

212.92 Refunds.—

(1) The following refunds shall apply to the tax imposed by this part, to the extent provided herein:

(e) Refund to farmers and fishermen.—

1. For the purposes of this paragraph, "agricultural purposes" means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used

exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms. The transporting of bees by water and the operating of equipment used in the apiary of a beekeeper shall be also deemed an agricultural purpose.

2. For the purposes of this paragraph, "commercial fishing purposes" shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public, but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

212.95 Distribution of proceeds.—

(1) Notwithstanding other provisions of law to the contrary, moneys collected pursuant to this part shall be deposited in the Gas Tax Collection Trust Fund created by s. 206.45. Said moneys, exclusive of the service charge imposed by s. 215.20, and exclusive of refunds granted pursuant to s. 212.92, shall be distributed monthly to the State Transportation Trust Fund, except that $2,800,000 per year in equal monthly amounts shall be transferred to the Department of Natural Resources.

(2) Not less than 10 percent of the moneys deposited in the State Transportation Trust Fund pursuant to this section shall be allocated by the Department of Transportation for public transit and rail capital projects, including service development projects, as defined in

s. 341.031(2) and (3), unless otherwise provided in the General Appropriations Act.

(3) All funds transferred herein to the Department of Natural Resources shall be used for eradication, control, and research of water hyacinths and noxious aquatic vegetation.

Section 16. Section 206.46, Florida Statutes, is amended to read:

206.46 State Transportation Trust Fund, *construction, etc., of roads.*—All moneys in the State Transportation Trust Fund**[**, which is hereby created,**]** shall be used for **[**transportation purposes**]** *the construction and maintenance of state roads,* as *otherwise* provided by law, under the direction of the Department of Transportation, which department may from time to time make requisition on the Comptroller for **[**such**]** funds *to pay for the construction and maintenance of state roads.* Money from said fund shall be drawn by the Comptroller by warrant upon the State Treasury pursuant to vouchers and shall be paid in like manner as other state warrants are paid out of the appropriated fund against which same are drawn. All sums of money necessary to provide for the payment of the warrants by the Comptroller drawn upon said fund are appropriated annually out of the fund for the purpose of making such payments from time to time.

207.003 Privilege tax levied.—A tax for the privilege of operating any commercial motor vehicle upon the public highways of this state shall be levied upon every motor carrier at **[**a rate which includes**]** the rate provided in chapter 206, and *including* the sales tax *which may be* imposed **[**by part II of**]** *in the future by the repeal of the current exemption in* chapter 212, on each gallon of special fuel or motor fuel used for the propulsion of a commercial motor vehicle by such motor carrier within the state.

Section 38. Section 339.08, Florida Statutes, 1982 Supplement, is amended to read:

339.08 Use of *gas* tax revenue by department.—

(1) The department shall by regulation provide for the expenditure of the [moneys in the State Transportation Trust Fund] *proceeds of the first gas tax* accruing to the Division of Road Operations, in accordance with its annual budget.

(2) Such regulations shall provide that the use of [said moneys] *the first gas tax* be restricted to the following purposes:

(a) To pay administrative expenses of the department, including administrative expenses incurred by the several state road districts.

(b) To pay the cost of construction of the State Highway System and State Park Road System, including amounts necessary to match federal aid funds for such purposes. The department shall also match federal aid highway funds allocated to the county road and city street systems.

(c) To pay the cost of maintaining the State Highway System and State Park Road System.

(d) To make such other lawful expenditures of the department for the payment of which no other funds may be specified, including the payment of compensation to employees of the Division of Road Operations except those employees whose jobs are designated as "J" in the official Florida merit system pay plan for overtime work in excess of 40 hours per week or other accepted standard work week, in cash or by way of compensatory time as may be prescribed by regulation of the department. Any other laws in conflict herewith are hereby repealed.

(e) To pay the cost of maintaining state roads which were classified or maintained as primary roads on January 1, 1956, and not included by the road board in the state primary highway system when said system was reclassified by the road board in June 1956, pursuant to the provisions of this code.

Section 61. Section 220.189, Florida Statutes, is created to read:

220.189 Airlines corporate tax credit.—

(1) There shall be allowed as a credit against the tax imposed by this part for the taxable year an amount which shall not exceed whichever of the following is the lesser:

(a) One-half of the tax imposed upon, and paid by, any qualified airline carrier pursuant to part II of chapter 212;

(b) Five million dollars.

(2) The credit granted in this section shall be allowed only to an air common carrier licensed as a common carrier by the Civil Aeronautics Board to transport persons or property in interstate or foreign commerce which maintains or establishes its corporate or business home office in this state and which maintains a work force within this state of more than 1,200 employees.

(3) The department shall promulgate any rules necessary to ensure the orderly implementation and administration of this section.

(4) If the credit granted pursuant to this section is not fully used in any one year, the unused amount may be carried forward for a period not to exceed 5 years. The carryover credit may be used in a subsequent year when the tax imposed by this chapter for such year exceeds the credit for such year under this section after applying the other credits and unused credit carryovers in the order provided in s. 220.02(9).

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA

Case No.: 63,915

DELTA AIR LINES, INC.,

Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Delta Air Lines, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Florida denying appellant's motion for rehearing and affirming, in part, the circuit court's judgment upholding the constitutional validity of Chapter 83-3, Laws of Florida, which final order was entered herein on September 12, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2), and a copy of this notice of appeal is being concurrently filed in the Circuit Court in and for Leon County, Florida.

/s/ J. Michael Huey
J. MICHAEL HUEY, ESQUIRE
GEOFFREY B. SCHWARTZ, ESQUIRE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by hand delivery, to Larry E. Levy, Esquire, Department of Revenue, Room 203, Carlton Bldg., Tallahassee, Florida 32301 and Joseph C. Mellichamp, Esquire, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, and, by U. S. Mail, to Barry R. Davidson, Esquire, Steel, Hector & Davis, Southeast Bank Bldg., Miami, Florida 33131, Joseph C. Jacobs, Esquire and James R. McCachren, Jr., Esquire, Ervin, Varn, Jacobs, Odom & Kitchen, P. O. Drawer 1170, Tallahassee, Florida 32302, Jack M. Skelding, Esquire, Madigan, Parker, Gatlin, Swedmark & Skelding, P. O. Box 669, Tallahassee, Florida 32302 and J. C. O'Steen, Esquire and Thomas W. Lager, Esquire, Lager, Woodward & O'Steen, P. O. Box 494, Tallahassee, Florida 32302, this 30th day of October, 1984.

/s/ J. Michael Huey
Attorney

Office-Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

(2)

CASE NO. 84-929

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

DELTA AIR LINES, INC.,

Appellant,

vs.

STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellee,

On Appeal From the Supreme
Court of Florida

MOTION TO DISMISS OR AFFIRM

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POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellant have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellant argues strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, and although Appellant submitted evidence and testimony with regard to same in the Trial Court, this contention was rejected by the Trial Court both factually and legally. Although the Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute,[1] no testimony was taken. Even if such were a factual issue, it has been resolved against

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[1]Northeastern Airways, Inc., and Arrow Air, Inc., v. State of Florida, Department of Revenue. Case No. 84-929

the evidence and testimony presented by the Appellant, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

Virtually all of the Appellant's argument is premised on the false assumption that the taxes imposed under Chapter 212, Florida Statutes, are user fees. This is not, and never has been true.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANT HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES

OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Both these points will be considered together.

A. THE TAX IS AN EXCISE TAX, NOT A USER FEE.

The highest Court in Florida has construed the statute, Chapter 212, Florida Statutes, as a statute imposing a tax on vendors for the privilege of engaging in business and exercising the taxable events and transactions provided for therein. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959); Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964). This determination by the Florida Supreme Court is consistent with similar determinations

which have been made by this Court on numerous occasions when analyzing and determining the type of tax imposed by state law and in determining the legal incident which gives rise to such tax. See Edelman v. Boeing Air Transport,Inc., 289 U.S. 249 (1933), Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932) and United Airlines v. Mahin, 410 U.S. 623 (1973).

In Eastern Air this Court considered a statute extremely similar to Chapter 212, Florida Statutes. (See footnote at page 151 of said decision, where the statute is quoted in its entirety.) In that case, the Court pointed out that the tax was imposed against the dealer for the privilege of carrying on the business of selling

gasoline within the state. In Boeing Air, the tax was imposed at the time the gasoline was withdrawn from the tanks for use in the aircraft. The statute in the case at bar imposes a tax on the legal incident of sale or transfer and collects same on such first sale or transfer which is generally the first withdrawal from storage for use. In the Mahin case, the tax involved was a general revenue use tax applying to the privilege of using tangible personal property in the state. The tax involved in that case, was imposed on the legal incident of storage or withdrawal from storage of the fuel. This Court upheld the state taxes in all such cases and the decision of the Florida Supreme Court in the instant case has reached a

similar conclusion in upholding the Florida statute. Thus, the Florida Supreme Court's decision is consistent with the decisions of this Court interpreting similar statutes from other states. Accordingly, this appeal does not present a substantial federal question, and based on the decisions reached by this Court in the aforementioned cases, it is manifest that the questions on which the decision in this cause depend are so insubstantial as not to need further argument. This Court has held that on appeal from a State Court judgment in an action challenging the constitutionality, the United States Supreme Court will defer to the State Court's determination that the taxable event is storage rather than the consumption of the fuel, where

there is no reason to ignore or to disagree with such determination. United Airlines v. Mahin, 410 U.S. 623 (1973); United States v. Burnison, 339 U.S. 87 (1950). In this case, the Supreme Court of Florida has construed the tax imposed under Chapter 212, Florida Statutes, as an excise tax, imposed on the vendor for the privilege of engaging in business, and has held, based on the statutory language, that the tax is imposed on the incident of the first sale or transfer within the State, which generally occurs on the first withdrawal or withdrawal for use from storage of the fuel. This is significant because the Appellant's argument is premised on the statement that the Supreme Court of Florida erred in concluding that the tax imposed

was a sales tax imposed on the vendor for the privilege of engaging in business, instead of a user fee. The cases cited by the Appellant are cited for authority premised on the false assumption that the tax imposed is a user fee.

This Court in its decision in Commonwealth Edison Company v. State of Montana, 453 U.S. 609, (1981) pointed out the distinction and stated that those cases in which the Court reviewed challenges to "user" fees or taxes must be put aside and cited the case relied upon by the Appellants, Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972). The decision of the Florida Supreme Court recognized this distinction, and cited both the Montana

case, and the Evansville case, and properly applied the distinction as drawn by this Court in the Montana case. Thus, the Florida Supreme Court's decision is consistent with this Court's prior decisions in both cases. It specifically held that the tax was unlike the true "user fee" or "user tax". The Florida Supreme Court's determination that the involved tax is an excise tax and not a user fee, should be binding and controlling on this issue.

B. INTERSTATE COMMERCE

The Florida Supreme Court's determination that the tax is an excise tax and not a user fee is actually decisive in part of the Appellant's argument with regard to the four prong test cited in Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977). The Florida Supreme Court's decision cites the Brady case, listed each

of the four prongs and considered and applied each of same adversely to the contentions argued by the Appellant. Appellants contended that the tax offended the last two prongs of the test set forth in Brady, in that it discriminated against interstate commerce and was not fairly related to the services provided by the State. The Florida Supreme Court rejected this, and properly so.

The Appellant's contention that the tax is not fairly related to the services provided by the State misconceives the nature of the tax imposed under Chapter 212, F.S., and is premised on the false assumption that the imposition is a user fee instead of an excise tax. This has

been discussed previously and it has been pointed out that under this Court's previous decisions, no specific inquiry is required into whether or not the tax is fairly related to the services provided by the State, where the State must demonstrate a specific or direct benefit flowing when, as in the instant case, the tax is a general revenue tax such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, supra. In this Court's decision in the Montana case, it recognized that the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

This Court reached a similar decision in the case of Carmichael v. Southern Coal & Coke Company, 301 U.S. 495 (1937), so the Appellants' contention that a specific judicial inquiry is required in which an amount of specific benefit may be ascertained, has already been foreclosed and resolved against the Appellants' contention by this Court in other decisions. The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly no substantial federal question exists.

With regard to the Appellant's contention that the statute singles out airlines and classifies them improperly, this contention too has already been re-

solved by decisions of this Court adverse to the contentions of the Appellants. In this Court's decision in Nashville, Chattanooga, & St. Louis Railway v. Wallace, 288 U.S. 249 (1933), the Supreme Court upheld a state statute imposing an excise tax on the privilege of engaging inthe gasoline business, the proceeds of which were used solely for construction and maintenance of highways. The railway contended that since it was a railway and did not use the state highway system, that the statute discriminated against it. The rail carrier purchased large quantities of gasoline outside of the State of Tennessee and brought them into the State in tank

cars from which it was unloaded and stored in the railway's own storage tanks. None was sold by the railway but all was withdrawn and used by it as a source of motor power in interstate railway operation in Tennessee, Kentucky, Alabama, or Georgia. The Court held that the allegations of the railway showing a heavier burden of taxation imposed upon railroads than upon common carriers by motor bus, fell short of alleging discrimination forbidden by either the Commerce Clause or the Fourteenth Amendment. Furthermore, it should be remembered that other competing carriers engaging in interstate commerce, are required to pay other taxes on purchases of fuel under Chapters 206 and

207, Florida Statutes, which are not imposed upon airlines. All airlines pay the same tax as would be imposed on an individual person purchasing fuel from a service station. This is so because the tax is on the first withdrawal or use and is collected on the first transfer, and since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Since this legal incident can occur only once, as this Court stated in Montana, there can be no question regarding apportionment or potential multiple taxation. Substantial nexus clearly exists and since there is no danger of multiple taxation, because the legal incident of withdrawal and first transfer can occur

only once, both the first and second prongs of the Brady test are met. Furthermore, there is no singling out interstate business because the same tax is imposed on the first transfer of fuel, whether it is to be used in intrastate, interstate or foreign commerce or transportation.

That a state may classify persons and property for tax purposes has been uniformly recognized by this Court in numerous of its decisions, many of which were cited and relied on by the Florida Supreme Court in its decision. Basically, the Appellant is contending that it should be allowed to apportion the taxes imposed under Chapter 212, Florida Statutes, but the Florida Supreme Court's decision that such was not required is amply supported by the decisions of this Court. See Allied Stores

of Ohio v. Bowers, 358 U.S. 522 (1959); Madden v. Kentucky, 309 U.S. 83 (1948); Carmichael, Wallace, and Montana. Airlines certainly benefit from a good road transportation system, and as the Florida Supreme Court pointed out Appellant operates in many of the major airports throughout the State, operating a commercial airline for profit. The persons and property which are transported through the air by airlines do not come to rest at the airports, but must generally use the public roads and highways of the State in automobiles or trucks, or some other means of public transportation to arrive at their ultimate destination. The Florida Supreme Court applied all the prongs of the four prong test set forth in Brady in precisely the same manner as they have been applied by this Court in its decisions. Thus, the

Florida Supreme Court's decision is consistent with this Court's decisions and the federal question presented is plainly insubstantial. Furthermore, as the Florida Supreme Court noted in its' decision in Eastern Airlines v. State of Florida, Department of Revenue, 465 So.2d. 311 (1984), pro-ration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean which permits airlines to avoid the accumulation of intrastate mileage.

With regard to the Appellant's contention that the rate applied violates the Commerce Clause, this contention is wholly without merit. The statute imposes the tax at a fixed rate of 5% on a fixed price per gallon of $1.148. The purpose of this is because the tax can only be effectively

collected on its first withdrawal from storage or distribution and at that time the wholesalers do not know the ultimate retail price to be set by the retailers. Thus, by fixing a price per gallon, the statute can be readily administered and the tax collected. Furthermore, the Legislature could just as easily have established the rate at a fixed amount per gallon sold, such as 6 cents per gallon or 9 cents per gallon and although the price charged per gallon may differ, the amount of tax collected would be the same. In fact, a license tax imposing a flat rate of 6 cents per gallon was upheld by this Court in Eastern Air Transport. The Supreme Court's decision is consistent with this Court's pronouncement in the Montana

case which held that the appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution. As this Court recognized in Carmichael, administrative convenience and expense in the collection and measurement of the tax are alone a sufficient justification for the difference between treatment. §212.70(2), Florida Statutes, contains the legislative finding as to convenience and necessity. Thus, the Appellant's contentions are plainly insubstantial. All air transport and individual persons in Florida pay the same tax on the purchase of fuel in Florida without regard to the fact that the fuel may ultimately be used in a vehicle which may be leaving the State. This is so because the tax is on the first

withdrawal or use and is collected on the first transfer. Furthermore, since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Second, since the tax is an excise tax on the privilege of engaging in the business of selling special fuel and motor fuel, and not a user fee, it is not necessary to examine and determine if there is a direct benefit flowing to the Appellant. Thus, the Supreme Court's decision is squarely consistent with this Court's decision in Montana and in this Court's application of the four prong test set forth in Brady.

The Supreme Court's determination that

the tax is on the legal incident of withdrawal for use from storage is also consistent with this Court's decision in Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932), Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933), Nashville, Chattanooga, & St. Louis Railway v.Wallace 288 U.S. 249 (1933). and United Airlines v. Mahin, 410 U.S. 623. (1973) These cases recognized that the legal incident which gave rise to the taxes imposed was on the withdrawal from storage or use and sustained the taxes involved in all three cases. Thus, the Florida Supreme Court's decision is consistent with these prior United States Supreme Court decisions, and accordingly no substantial federal question

exists, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

C. EQUAL PROTECTION CLAUSE

The Florida Supreme Court held that no violation of the Equal Protection Clause occurred and this decision is consistent with the decisions of this Court dealing with legislative classification for tax purposes. The test to be applied in examining the state classification, has been set forth by this Court in several cases including Madden, Allied Stores, and Carmichael. The Florida Supreme Court cited and applied these cases. Furthermore, virtually the identical issue was before this Court in the Wallace case,

where the objection was made that a heavier burden of taxation was imposed upon railroads than upon common carriers by motor bus, and that the tax was earmarked for roads which the railroads did not use. As has been previously demonstrated herein, other common carriers traveling by road, water, or railway, pay fuel taxes which are not required to be paid by airlines, and do not enjoy certain relief from imposition of ad valorem taxes as is enjoyed by airlines.

The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly the questions raised are plainly insubstantial.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to

grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

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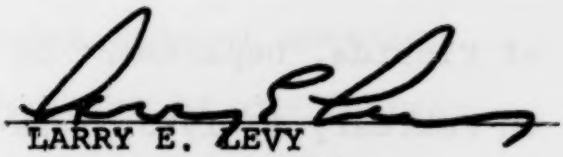
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PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 1, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellant, DELTA AIR LINES, INC., by mailing copies in duly addressed envelopes, with first class postage prepaid, to James W. Callison and Helene Z. Cohen, Delta Air Lines, Inc., Law Department, Hartsfield Atlanta International Airport, Atlanta, Georgia 30320; J. Michael Huey, Geoffry B. Schwartz, Laurel D. Landry, Akerman, Senterfitt & Eidson, Post Office Box 1794, Tallahassee, Florida 32302; Don M. Adams and D. Michael Keen, Delta Air Lines, Inc., Hartsfield Atlanta International Airport, Atlanta, Georgia 30320.

All parties required to be served have been served.



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No. 84-929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DELTA AIR LINES, INC.,
Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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THERE ARE SUBSTANTIAL NEW ISSUES PRESENTED BY THIS APPEAL

The issues raised in this appeal are substantial and have not been addressed by this Court.

The decision of the Supreme Court of Florida relies upon characterizations of the tax based upon cases decided in this Court which have been effectively overruled by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and therefore is inconsistent with more current decisions of this Court.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

If this case involved a nondiscriminatory general revenue tax, Delta Air Lines, Inc. ("Delta") would never have sought judicial review and would therefore agree with the Florida Department of Revenue (the "Department") that the commerce clause issues raised herein have already been addressed by this Court. But if the tax involved here is a user tax, the Department apparently agrees with Delta that a different analysis must be applied than that made by the Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); one which this Court has yet to face.

The Supreme Court of Florida decided that the sales tax on fuel imposed in Chapter 83-3 was not a user tax as a matter of law and as a matter of fact. Applying outdated commerce clause cases, it characterized the tax simply as an "excise tax" on the privilege of engaging in certain businesses. If states are permitted to characterize earmarked taxes as general revenue taxes in this fashion, they will also be permitted, in effect, to repudiate the clear and logical analysis of a tax required in *Complete Auto Transit* and once again to elevate form over substance *ala Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

Similarly, the commerce clause and equal protection issues embodied in a so-called percentage sales tax, set at an artificial level, which taxes jet fuel at a higher rate than gasoline and which does not apply to other non-road users including non-road user common carriers, have not been heretofore addressed by this Court. This case is important because other states have already indicated a desire to follow the pattern established by Florida of a tax on airlines' fuel purchases to raise money for special projects not related to airlines. The Court should

establish clear constitutional parameters for the imposition of user taxes and recognize the need for like treatment of similar interstate common carriers.

II. THE TAX IS A USER FEE

The tax imposed on fuel in Chapter 83-3 and earmarked primarily for road building and maintenance must be recognized for what it is—a road-user tax. The Department argues that the tax is an excise tax and not a user fee. But what is a user fee if it is not an excise tax imposed for the privilege of using a facility? *The term "excise tax" is generic.* All of the Florida cases cited by the Department construing Chapter 212 as an excise tax applied to the Chapter before it was amended by Chapter 83-3, and therefore have no precedential value for the tax at issue. The Supreme Court cases which the Department cited are also inapposite. More importantly, none of these cases relates to the issue of whether the tax is a general revenue or user tax.

Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933) cited as an example of a constitutional excise tax involved a "use" tax. Fuel was purchased outside of Wyoming, then brought into the State, stored, and subsequently used in interstate commerce. The use tax was imposed upon the withdrawal from storage. The Court held that the exercise of the powers taxed, the storage and withdrawal from storage, was too indirect and remote from the function of interstate commerce to transgress constitutional limitations. There was no indication that the tax was used for anything other than general purposes or was imposed only on a selective group of taxpayers.

In *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932), the tax challenged was a sales tax described as a license tax imposed for the privilege of carrying on the business of selling gasoline within the State. The tax was construed to be an

excise tax as opposed to a property tax. The Court applied the then current direct/indirect burdens test for constitutionality under the commerce clause and held that the tax was imposed on goods sold and its validity could not be questioned because the tax would be upon a part of property within the State and hence subject to the State's authority to tax. The *Eastern* case also did not address the general revenue/user tax issue, but did address the need for similar treatment of airlines and railroads in holding there was no distinction between the sale of coal for locomotives and gasoline used in airplanes for tax purposes.

Similarly *United Air Lines v. Mahin* 410 U.S. 623 (1973) does not address the general revenue/user tax question. That case deals with a use tax imposed on fuel purchased outside Illinois, brought into the State and stored there. The State had imposed the use tax on fuel on withdrawal from storage using a pro-ration (a "burn-off" rule) and applying a temporary storage exemption to the fuel stored in the State but used in interstate commerce. A new interpretation of the Department of Revenue had denied the applicability of the temporary storage exemption. The Court held that it was not an unconstitutional burden on interstate commerce to tax the entire withdrawal from storage, but the Court also held that the burn-off rule was not unconstitutional, distinguishing *Helson v. Kentucky*, 279 U.S. 245 (1929) relied upon by the Supreme Court of Illinois and remanded the case for further consideration in light of this. This case too, did not address the issue Delta now raises.

While the Florida Supreme Court characterized the tax imposed under Chapter 83-3 as an excise tax imposed on the privilege of engaging in certain businesses, the tax was imposed on the incident of first withdrawal. Typically a sales tax is imposed on the privilege of making retail sales and a corresponding use tax is im-

posed on the use of property purchased elsewhere but used in the state. Florida is trying to have it both ways with this tax. The State has adopted sales tax analogies where it is desirable and use tax analogies where those are advantageous. The tax on the incidence of withdrawal from storage, or storage itself, is a use tax characteristic that is applied when property is purchased outside the state but stored inside the taxing state; yet the tax is being applied to purchases within the state, not to the storage or withdrawal from storage itself.

The fact that the tax under Chapter 83-3 is an excise tax as argued by the Department is not determinative of whether the tax is a general revenue tax or a user tax. Both are excise taxes. It is also not relevant whether this is a sales tax or a use tax or whether the sale or withdrawal from storage in the State is taxed. It is the *purposes* for which the funds are raised and *from whom* the tax is collected that determine whether a tax is a user (excise) tax or a general revenue (excise) tax. When a tax is collected solely from road users (except for airlines) and used for road purposes, then it should be characterized as a road-user tax. The fact that the State collects the tax from the wholesaler instead of at the pump also is irrelevant. The tax was imposed to fund Florida's highways and is ultimately borne by the fuel consumer to pay for his use of the roads. The airlines are anomalous non-user taxpayers, indeed, the only non-user taxpayers. Other non-user common carriers and other non-road-user purchasers have been properly excluded.

The tax challenged in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) was imposed on airline passengers to pay for airport facilities. The Court held:

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs

> of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.

Id. at 714. The Court likened the fee to a highway toll imposed upon highway users. Even in those cases which the Court cited involving highway fees, the toll could not be excessive and some highway user taxes were invalidated because the standards were wholly unrelated to road use.

The tax here imposed under Chapter 83-3 was compared to a highway toll charge by Dr. Small, Delta's expert witness, who testified that Florida's fuel tax operates identically to a toll bridge or toll road. Other than the airlines, the taxpayers are exclusively road users (agricultural, fishing, home heating and other non-road uses are exempt from the tax). The amount of the tax paid by each user bears a direct relationship to his use of the roads. This tax is therefore almost identical to the tax reviewed in *Evansville-Vanderburgh.*

Obviously, if the distinctions relied upon by the Department and accepted by the Supreme Court of Florida are permitted to prevail, then every state will play the semantics game played by Florida to avoid a commerce clause constitutional challenge. It is the threshhold question of law as to the characterization of the tax which we seek to have the Court examine. A finding by the Court that this road tax is a user tax should result in a finding also that the tax as applied to the airlines violates the "fairly related" fourth prong of the *Complete Auto Transit* test.

III. THE TAX SINGLES OUT AIRLINES

The Department addresses many of Delta's equal protection arguments in its commerce clause arguments but misses the thrust of Delta's arguments. The Department also fails to understand the third prong commerce clause

argument which Delta raises. These arguments both demonstrate discrimination against the airlines. In the former, Delta argues that airlines are treated unfairly as opposed to other non-road-user common carriers. In the latter, Delta argues that interstate airlines pay a higher rate of tax than other, primarily intrastate, taxpayers pay which violates the third prong of the *Complete Auto Transit* test.

A. Airlines Versus Railroads and Vessels

The Department relies upon *Nashville C. & St. L. R. Co. v. Wallace*, 288 U.S. 249 (1933) in its commerce clause arguments for the principle that the tax is an "excise tax" and presumably therefore a general revenue tax and for the proposition that the airlines are not discriminated against by having to pay a road tax when they do not use roads. The Department also relies upon this case for its response to equal protection arguments.

The discrimination argument made in *Wallace* by the railroads that they were taxed for roads they did not use was a commerce clause argument very similar to the third and fourth prong arguments which Delta now raises. The Court in 1933 applied the direct/indirect burdens commerce clause analysis and found no discrimination under the commerce clause. The "fairly related" test had not been developed and the analysis was that the fuel was taxed before it entered interstate commerce and therefore was not a burden on interstate commerce.

The equal protection question raised by Delta challenges the classification of airlines differently from other non-road user common carriers, railroads and vessels. The only basis which has been asserted for that classification is the ad valorem tax exemption of leasehold interests from which airlines (as well as other lessees of governmental property) benefit. Even under the broad discretion for classification afforded to the states, that ex-

emption would not justify the imposition of $53 million of fuel tax annually on airlines while totally exempting railroads and vessels from the tax.

B. Airlines Versus Other Taxpayers

The Department argues that the tax is imposed on a fixed price per gallon, facilitating collection, because it is collected on its first withdrawal from storage and that the tax is similar to a "cents per gallon" excise tax. Delta agrees that the tax could have been framed as a "cents per gallon" excise tax similar to the old road user fuel tax had it been left in the old fuel tax chapter instead of being moved to the sales tax chapter. The whole purpose however in moving the tax to Chapter 212 was to avoid the road user designation. Chapter 212 does not impose a "cents per item" tax. It purports to impose a 5% tax on sales and use. By using the percentage sales tax and contriving an artificial fixed price of fuel predicated on the price of gasoline and indexed based on the gasoline price index, the Legislature, in reality, imposed a higher percentage tax on airline fuel, which has historically been priced lower than gasoline. That is not to say that a "cents per gallon" tax for general revenue purposes could not be constitutionally imposed on jet fuel. It is to say, however, that the fuel tax under Chapter 212 does not meet constitutional muster under the third prong of the *Complete Auto Transit* test since the primarily intrastate motorist pays only a 5% tax while the only interstate common carrier taxed pays a tax in excess of 6%.

CONCLUSION

For each of the reasons set forth above and in Delta's Jurisdictional Statement, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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Nos. 84-921, 84-926 and 84-929

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

EASTERN AIRLINES INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a sales tax imposed by Florida on aviation fuel purchased within that State violates the Interstate Commerce Clause.

2. Whether Florida's scheme of fuel taxation violates the Equal Protection Clause by treating airlines differently in some respects than other carriers.

3. Whether the Florida Supreme Court erred in determining that appellant in No. 84-926 lacks standing under Florida law to challenge the validity of a tax statute governing tax refunds to certain farmers and fishermen.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-921

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

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FLORIDA DEPARTMENT OF REVENUE

No. 84-929

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-921 (J.S. App. 1a-4a) is unreported. The opinion of the Florida Supreme Court in No. 84-926 (J.S. App. 2-14) is reported at 455 So. 2d 311. The opinion of the Florida Supreme Court in No. 84-929 (J.S. App. 1a-12a) is reported at 455 So. 2d 317. The opinions of the Broward County Circuit Court (84-921 J.S. App. 6a-19a) and of the Leon County Circuit Court (84-926 J.S. App. 15-16; 84-929 J.S. App. 25a-37a) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-921 J.S. App. 20a; 84-926 J.S. App. 33; 84-929 J.S. App. 24a). Notices of appeal in the Florida Supreme Court were filed respectively on December 6, 1984 (84-921 J.S. 11; J.S. App. 80a-81a), on November 28, 1984 (84-926 J.S. App. 34-35), and on October 30, 1984 (84-929 J.S. App. 48a-49a). The jurisdictional statement in No. 84-921 was filed on December 10, 1984, and the jurisdictional statements in Nos. 84-926 and 84-929 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

1. Florida for many years has imposed a variety of taxes on different types of fuel purchased within that State. Prior to April 1, 1983, gasoline and diesel fuel were subject to an excise tax at the flat rate of 8¢ per gallon. Fla. Stat. Ann. § 206.01 *et seq.* (West 1971). This tax was paid principally by individual motorists, bus lines, and trucking companies. Other carriers, such as railroads, maritime shipping companies, and airlines, were exempt from this tax. Instead, they paid the general sales tax—technically imposed on the seller for the privilege of doing business in Florida, but required to be passed on to purchasers—at a rate of 5% of the fuel's retail price. *Id.* §§ 212.05, 212.07. The sales tax, as applied to fuel purchased by these carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its total mileage for the previous fiscal year. *Id.* § 212.08(4)

Effective April 1, 1983, Florida amended its fuel tax regime in the following relevant respects:

(a) The scheme governing railroads and maritime shipping companies remained basically the same. They continued to pay the 5% general sales tax on the actual price of the fuel they purchased, and their tax continued to be prorated on a mileage basis.

(b) The scheme governing roadway users was changed considerably. Gasoline and diesel fuel remained subject to the flat excise tax, but the rate was reduced from 8¢ to 4¢ a gallon (84-926 J.S. App. 3). In addition, gasoline and diesel fuel were made subject, for the first time, to the 5% general sales tax (Fla. Stat. Ann. § 212.62 (West Supp. 1985)). Rather than being applied to the actual retail price, however, the 5% levy was applied in the case of gasoline and diesel fuel to an "initially established price" of $1.148 per gallon (*id.* § 212.62(3)(c)). This "initially established price" was to be adjusted for inflation beginning June 1, 1985 (*id.* § 212.62(3)(a)). No provision was made for prorating the sales tax, as applied to gasoline and diesel fuel, on the basis of mileage. See *id.* § 212.08(4). Thus, the aggregate tax burden on these items was effectively increased from 8¢ a gallon to 9.7¢ a gallon.

(c) The scheme governing airlines was also changed considerably. They remained exempt from the flat excise tax, and they remained subject to the 5% general sales tax. However, the method of computing their sales tax liability was assimilated to the newly-established method of computing the sales tax on gasoline and diesel fuel. That is, the 5% rate was applied, not to the actual retail price of jet fuel, but to an "initially established price" of $1.148 per gallon, the same figure used for diesel fuel and gasoline. See Fla. Stat. Ann. §§ 212.02(22), 212.62 (West Supp. 1985). And the mileage proration formula, while remaining in effect for railroads and maritime shipping companies, was re-

pealed in the case of airlines. Compare Fla. Stat. Ann. § 212.08(4) (West 1971) with Fla. Stat. Ann. § 212.08(4) (West Supp. 1985). Finally, a new credit against the State's corporate income tax was created, providing for an offset against that tax equal to one-half the carrier's fuel tax liability, up to a maximum credit of $5 million (*id.* § 220.189). This credit was made available only to air common carriers who had their home office in Florida and who maintained a work force of more than 1,200 employees in the State. *Ibid.;* see 84-929 J.S. App. 2a.

2. Appellants in these three cases are domestic airlines incorporated under the laws of various states and registered to do business in Florida (84-921 J.S. 1, 16; 84-926 J.S. 4; 84-929 J.S. App. 28a). Delta Air Lines, appellant in No. 84-929, has its home office in Georgia (J.S. 8). Northeastern International Airways and Arrow Air, appellants in No. 84-921, have their home offices in Florida but have fewer than 1,200 employees based there (J.S. App. 11a). Eastern Airlines, appellant in No. 84-926, has its home office in Florida and also has more than 1,200 employees based in that State. Appellants are principally engaged in interstate commerce, but also fly on some foreign routes (84-921 J.S. 16; 84-926 J.S. 4; 84-929 J.S. 8).

Appellants brought these actions in Florida trial court, challenging various aspects of the State's fuel tax regime under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Interstate Commerce Clause, and on miscellaneous state-law grounds (84-921 J.S. App. 10a-11a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 25a). The trial courts upheld the statute in all respects (84-921 J.S. App. 18a-19a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 36a-37a). The cases were certified directly to the Florida Supreme Court (84-921 J.S. App. 1a; 84-926 J.S. App. 2; 84-929 J.S. App. 2a), which affirmed in part and reversed in part.

It rejected appellants' federal constitutional challenges to the fuel tax itself (84-921 J.S. App. 1a-4a; 84-926 J.S. App. 2-13; 84-929 J.S. App. 2a, 6a-12a). However, it sustained a challenge, mounted by carriers other than Eastern, to the constitutionality of the income tax credit, holding that the credit "clearly discriminates against interstate commerce because [it] provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers" (84-929 J.S. App. 4a, citing *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977) (emphasis in original)). The credit provision was severed from the statute (84-929 J.S. App. 6a, 12a) and the statute as thus modified was sustained. The airlines have appealed the Florida Supreme Court's judgment insofar as it is unfavorable to them; Florida has not cross-appealed as to the constitutionality of the income tax credit.[1]

DISCUSSION

1. Appellants contend that Florida's sales tax on aviation fuel places an unconstitutional burden on interstate commerce, pointing out that the fuel they buy is consumed on interstate flights and that Florida's levy is no

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[1] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348. The amendments exempt aviation fuel from sales tax, but impose upon it a new excise tax in approximately the same amount. Compare *id.* §§ 2 and 3 with Fla. Stat. Ann. § 212.62 (West Supp. 1985). The invalidated income tax credit is replaced with a provision allowing refund of the new excise tax in an amount "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). Enactment of these amendments, which apply only prospectively (*id.* § 9), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985. We of course intimate no view as to the constitutionality of the 1985 amendments.

longer prorated to reflect that fact. This contention is insubstantial in light of this Court's decision in *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n*, 285 U.S. 147 (1932). The Court there upheld a nondiscriminatory, unapportioned sales tax as applied to aviation fuel purchased within South Carolina for use in interstate commerce, reasoning that the taxable event was sale of the fuel and that such sales were "purely intrastate transactions" (285 U.S. at 152). Accord, *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 629 (1973) (rejecting Commerce Clause challenge to state use tax as applied to aviation fuel "withdrawn from storage for consumption in an interstate vehicle"); *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 252 (1933) (same).

Appellants attempt to dismiss these cases as "out-of-date" (84-929 J.S. 13-14) because they were decided under the "direct burden" approach to interstate commerce which this Court abandoned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). However, the "direct burden" approach was a doctrine that had been used mechanically to *strike down* state laws which, as drafted, technically imposed a levy on "the privilege of doing [an interstate] business" (430 U.S. at 278-279 (original quotation marks omitted)). In repudiating that doctrine, obviously, the Court cast no doubt on the continuing validity (at least as to result) of decisions that had *sustained* state taxes under the old rubric.

In any event, there is no merit to appellants' suggestion (84-921 J.S. 35-36; 84-929 J.S. 10-18) that Florida's tax fails *Complete Auto*'s "fair apportionment" or "fair relation" tests. See 430 U.S. at 279. Because the taxable event—sale of the fuel—takes place wholly within Florida, no other state could undertake to impose a tax on that transaction, and apportionment is thus not constitutionally required. Appellants' contention that Florida's tax is not "fairly related to the services

provided by the State" (*Complete Auto,* 430 U.S. at 279) is based on assertions that the tax is really a user fee, that the proceeds of the tax are devoted to road construction, and that airlines do not derive from Florida's roads a benefit proportional to the tax they pay. See 84-921 J.S. 37-39; 84-929 J.S. 11-17. As the courts below pointed out, however, each of these assertions is erroneous. See 84-921 J.S. App. 11a-12a; 84-929 J.S. App. 7a, 11a, 29a, 34a. The tax is plainly a sales tax because its legal incidence is upon the fuel seller and is imposed for the privilege of selling fuel in Florida. The proceeds of the tax are not devoted to "the construction and maintenance of state roads," as was once true (Fla. Stat. Ann. § 206.46 (West 1971)), but go into a trust fund to "be used for transportation purposes" (Fla. Stat. Ann. § 206.46 (West Supp. 1985)). And appellants do enjoy, not only the benefits of Florida's public transportation network, but also "the benefits of a trained work force and the advantages of a civilized society" (*Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 445 (1979)).[2]

2. Appellants' equal protection challenge is also insubstantial. They contend that Florida's fuel tax regime

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[2] Although appellants appear to engage in foreign as well as interstate commerce (see 84-926 J.S. 4; 84-929 J.S. 8), they did not contend in either court below that Florida's tax as applied to them violates the Foreign Commerce Clause. See, *e.g.*, 84-921 J.S. App. 2a. In a brief filed at the Court's invitation contemporaneously with this one, we express the view that Florida's tax, as applied to aviation fuel purchased by foreign airlines for use exclusively in foreign commerce, is unconstitutional under the Foreign Commerce Clause as interpreted in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 451 (1979). See 84-902, 84-922 & 84-1041 Br. 30-35. The Court in *Japan Line* specifically declined to reach "questions as to the taxability * * * of domestically owned instrumentalities engaged in foreign commerce" (441 U.S. at 444 n.7). Since appellants did not raise this question below and consequently do not present it for review here, we have no occasion to address it.

places a heavier burden on airlines than on railroads and maritime shipping companies, since the latter (a) have their sales tax reduced by application of a mileage proration formula, a benefit airlines no longer enjoy, and (b) pay tax based on the actual price of their fuel, rather than (as is true for airlines) on an "initially established price" of $1.148 per gallon (84-921 J.S. 29-34; 84-926 J.S. 5-6; 84-929 J.S. 18-22). And appellants contend that Florida's fuel tax regime places a heavier burden on airlines than on trucking companies, even though both pay sales tax at 5% of an "initially established price" of $1.148 per gallon without mileage proration, since the market price of jet fuel during the relevant period was lower than that of diesel fuel and gasoline (84-921 J.S. 32-33; 84-929 J.S. 7 & n.4, 17). In appellants' view, the Equal Protection Clause requires that all carriers be treated identically.

It was long ago established that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky,* 309 U.S. 83, 88 (1940). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." An equal protection challenge can prevail "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Ibid.* Accord, *e.g., Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 359-365 (1973) (citing cases).

The courts below correctly concluded that appellants "failed to demonstrate that a hostile and oppressive discrimination has been made" (84-926 J.S. App. 5). Florida's fuel tax regime, as revised effective April 1, 1983, does appear to impose a heavier burden on airlines than on other carriers, although the differential burden depends in part on the relative market prices of

various fuels, whose fluctuations are of course beyond the Florida Legislature's control. Florida's overall tax system, however, treats airlines more favorably in other respects. See 84-921 J.S. App. 13a-14a; 84-929 J.S. App. 31a. The State, moreover, cannot be said to have lacked a rational basis for repealing the mileage proration formula in the case of interstate air carriers, since "proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage" (84-929 J.S. App. 31a). Although state taxes are not altogether immune from equal protection scrutiny (see *Metropolitan Life Ins. Co.* v. *Ward,* No. 83-1274 (Mar. 26, 1985)), the tax regime challenged here, relieved of the income-tax-credit provision struck down by the Florida Supreme Court, neither discriminates against out-of-state competitors nor lacks a rational relationship to Florida's legitimate purpose of raising money for public transportation.

3. Appellant in No. 84-926 challenges the holding that it lacks standing to contest the constitutionality of provisions governing fuel tax refunds to certain fishermen and farmers (J.S. iv, 4-5). Appellant did not allege that it competed, directly or indirectly, with farmers or fishermen (84-926 J.S. App. 11), and the Florida Supreme Court accordingly denied it standing to raise this challenge, reasoning that "the constitutionality of * * * a statute cannot be tested by a party whose rights or duties are not affected by it" (*id.* at 11-12). In so ruling, the court relied exclusively on Florida law. See *id.* at 11-13. In any event, its ruling is fully consistent with this Court's decisions. See *Allen* v. *Wright,* No. 81-757 (July 3, 1984).

CONCLUSION

The appeals should be dismissed for want of a substantial federal question.

Respectfully submitted.

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SEPTEMBER 1985